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Supreme Court, U.S.
FILED
DEC 23 2008
OFFICE OF THE CLERK
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No. 08-803

IN THE

Supreme Court of the United States

PAUL J. FROMMERT, ET AL.,

Petitioners,

v.

SALLY L. CONKRIGHT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether reversal by the United States Court of Appeals for the Second Circuit of the trial court's holding that Xerox Corporation's general release form, the execution of which is required for an employee to obtain severance pay, was unenforceable to bar the petitioners' claims under the Employee Retirement Income Security Act ("ERISA") contravenes principles of contract interpretation under federal common law.

2. Should legal standards which apply pursuant to the Older Workers Benefit Protection Act ("OWBPA") to determine whether a release form constitutes a "knowing and voluntary" waiver of claims under the Age Discrimination in Employment Act ("ADEA") also apply to determine whether a release form executed as a condition to the receipt of severance pay constitutes a "knowing and voluntary" waiver of ERISA claims?

LIST OF PARTIES

The plaintiff-appellees are: Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo, Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillan, Dennis E. Bains, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Sr., Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Crater, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thornton, Charles R. Drannbauer, William M. Burritt, Janice Ross Heiler, Thomas F. McGee, Vincent G. Johnson, F. Colt

Hitchcock, Ronnie Tabak, Martha Lee Taylor, Charles Willette and Richard J. Glikin.

The defendant-appellants are: Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Pension Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan and Xerox Corporation, a New York Corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ..... -i-

LIST OF PARTIES ..... -ii-

TABLE OF CONTENTS ..... -iv-

TABLE OF APPENDICES ..... -vi-

TABLE OF CITED AUTHORITIES ..... -viii-

OPINIONS BELOW ..... -1-

STATEMENT OF JURISDICTION ..... -1-

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED .... -2-

STATEMENT OF THE CASE ..... -3-

REASONS FOR ALLOWANCE OF THE WRIT . -8-

I. PRINCIPLES OF CONTRACT INTERPRETATION UNDER FEDERAL COMMON LAW MANDATE REINSTATEMENT OF THE TRIAL COURT'S HOLDING THAT THE RELEASE FORM WAS UNENFORCEABLE TO BAR THE PETITIONERS' SUCCESSFUL ERISA CLAIMS .. -11-

II. PRINCIPLES APPLYING TO DETERMINE IF WAIVERS ARE "KNOWING AND VOLUNTARY" UNDER THE OWBPA SHOULD ALSO APPLY TO DETERMINE WHETHER A WAIVER OF ERISA CLAIMS IS A KNOWING

AND VOLUNTARY ACT BY EMPLOYEES FACED WITH TERMINATION ..... -15-

CONCLUSION ..... -18-

TABLE OF APPENDICES

Appendix A - Opinion of the United States Court of Appeals for the Second Circuit dated and decided July 24, 2008 .. 1a

Appendix B - Order of the United States District Court for the Western District of New York dated and filed January 24, 2007 ..... 21a

Appendix C - Order of the Second Circuit denying the plaintiff-appellees' petition for rehearing or rehearing en banc dated September 25, 2008 ..... 50a

Appendix D - Mandate issued by the United States Court of Appeals for the Second Circuit dated October 22, 2008 .. 53a

Appendix E - Statutes and regulations involved 57a

Appendix F - Xerox general release form executed by Kenneth Pietrowski 78a

Appendix G - Jeffrey Love, Ph.D. & Gerard Rainville, *The Economic Slowdown's Impact on Middle-Aged and Older Americans*, AARP Research Report (June 2008) 84a

Appendix H - Excerpt from the Defendant-appellants' brief submitted to the Second Circuit 86a

Appendix I - Memorandum to Frances Tobin dated August 8, 2006 ..... 89a

Appendix J - Xerox Retirement Income Guarantee Plan Pension Calculation

Statement for Kenneth Pietrowski dated
January 31, 2006 ..... 90a

TABLE OF CITED AUTHORITIES

Cases

Adams v. Philip Morris, Inc.
67 F.3d 580 (6th Cir. 1995) ..... -10-

Baptist v. City of Kankakee
481 F.3d 485 (7th Cir. 2007) ..... -10-

Berger v. Xerox Retirement Income Guarantee Plan
157 F.Supp. 2d 998 (S.D. Ill. 2001), *affirmed*, 338 F.3d 755 (7th Cir. 2003) ..... -8-

Bergt v. Ret. Plan for Pilots Employed by Mark Air
293 F.3d 1139 (9th Cir. 2003) ..... -13-

Bledsoe v. Palm Beach County Soil & Water Conservation Dist.
133 F.3d 816 (11th Cir. 1998) ..... -10-

Burke v. Kodak Retirement Income Plan
336 F.3d 103 (2d Cir. 2003) ..... -13-

Chiles v. Ceridian Corp.
95 F.3d 1505 (10th Cir. 1996) ..... -13-

Edwards v. State Farm Mutual Automobile Ins. Co.
851 F.2d 134 (6th Cir. 1988) ..... -13-

EEOC v. AIC Security Investigations, Ltd.
55 F.3d 1276 (7th Cir. 1992) ..... -16-

Finz v. Schlesinger
957 F.2d 78 (2nd Cir. 1992) ..... -2-, -12-

Firestone Tire & Rubber Co. v. Bruch
489 U.S. 101 (1989) ..... -11-

Frommert v. Conkright
433 F.3d 254 (2d Cir. 2006) . . . . . -4-, -8-

Frommert v. Conkright
472 F.Supp. 2d 452 (W.D.N.Y. 2007) . . . . . *passim*

Frommert v. Conkright
535 F.3d 111 (2d Cir. 2008) . . . . . *passim*

Hansen v. Continental Ins. Co.
940 F.2d 971 (5th Cir. 1991) . . . . . -13-

Hernandez v. Philip Morris USA, Inc.
486 F.3d 1 (1st Cir. 2007) . . . . . -10-

Irons v. FBI
811 F.2d 681(1st Cir. 1987) . . . . . -16-

Jensen v. SIPCO, Inc.
38 F.3d 945 (8th Cir. 1994) . . . . . -13-

Laniok v. Brainerd Mfg. Co. Pension Plan
935 F.3d 1360 (2d Cir. 1991) . . . . . -9-, -17-, -18-

Layaou v. Xerox Corp.
330 F. Supp. 2d 297 (W.D.N.Y. 2004) . . . . . -5-

Layaou v. Xerox Corp.
238 F.3d 205 (2d Cir. 2001) . . . . . -3-, -4-, -8-

Long v. Sears Roebuck & Co.
105 F.3d 1529 (3d Cir. 1997) . . . . . -10-

Lumpkin v. Envirodyne Industries, Inc.,
933 F.2d 449 (7th Cir.1991) . . . . . -2-

Lynn v. CSX Transportation, Inc.
84 F.3d 970 (7th Cir. 1996) . . . . . -2-

Lynn v. CSX Transportation, Inc.
84 F.3d 970 (7th Cir. 1996) . . . . . -2-

Mathews v. Sears Pension Plan
144 F.3d 461, 466 (7th Cir. 1998) ..... -13-

McNight v. Southern Life & Heath Co.
758 F.2d 1566 (11th Cir. 1985) ..... -13-

Miller v. Xerox Corp. Ret. Income Guarantee Plan
464 F.3d 871 (9th Cir. 2006),
cert. denied 167 L.Ed. 2d 321 (2007) ..... -8-

Nachman Corp. v. Pension Benefit Guarantee Corp.
46 U.S. 359 (1980) ..... -9-

Oubre v. Entergy Operations, Inc.
522 U.S. 422 (1998) ..... -15-

Perreca v. Gluck
295 F.3d 215 (2d Cir. 2002) ..... -13-

Pierce v. Atchison, Topeka & Santa Fe Ry. Co.
110 F.3d 431 (7th Cir. 1997) ..... -12-

Rhoades v. Casey
196 F.3d 592 (5th Cir. 1999) ..... -2-

Siegelman v. Cunard White Star
221 F.2d 189 (2d Cir. 1955) ..... -7-

Varity Corp. v. Howe
516 U.S. 489 (1996) ..... -11-

Statutes

29 U.S.C. § 626(f) ..... -3-, -16-, -17-

28 U.S.C. § 1254(1) ..... -1-

29 C.F.R. § 1625.22 ..... -3-, -16-

29 U.S.C. § 626 ..... -3-

29 U.S.C. § 1022 ..... -3-

29 U.S.C. § 1022(a) ..... -4-

29 U.S.C. § 1022(b) ..... -3-

29 U.S.C. § 1053 ..... -2-

29 U.S.C. § 1054(g) ..... -4-

29 U.S.C. § 1054(h) ..... -5-

29 U.S.C. §1056(d) ..... -2-

Other Authorities

Supreme Court Rule 14.1(f) ..... -3-

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) ("*Frommert 2008*"). A portion of the decision in *Frommert 2008* vacated a ruling by United States District Judge David G. Larimer of the United States District Court for the Western District of New York that an employer-drafted standard release form which Xerox Corporation ("Xerox") required its employees to execute as a condition to the receipt of severance pay did not bar the otherwise successful claims of the plaintiff-appellees under ERISA to calculate their retirement benefits without implementation of a "phantom account" offset. The opinion of the District Court is reported at *Frommert v. Conkright*, 472 F.Supp. 2d 452 (W.D.N.Y. 2007) ("*Frommert 2007*").

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This statute states in relevant part that "Cases in the courts of appeals may be reviewed by the Supreme Court by ... writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The opinion in *Frommert 2008* was rendered on July 24, 2008. The plaintiff-appellees filed a timely Petition for Rehearing or Rehearing *en banc* on August 7, 2008. That petition was denied by the Second Circuit on September 25, 2008. Appendix C. On October 22, 2008, the Second Circuit issued its mandate and remanded the case to the District Court for further proceedings. Appendix D. At this writing, more than one month after the Second Circuit issued its mandate, no date for a post-remand hearing has been established.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section 203 of ERISA, 29 U.S.C. § 1053 provides that an employee's rights to retirement benefits become vested in various specified circumstances. No statutory provision under ERISA specifically addresses the circumstances under which such vested pension benefits may be waived. However, ERISA does contain a section captioned "Assignment or alienation of plan benefits," ERISA Section 206(d), 29 U.S.C. §1056(d), generally known as the anti-alienation provision, which states in pertinent part as follows: "(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

The above-cited anti-alienation provision reflects the intent of Congress that pension benefits promised by an employer deserve the highest level of protection to be afforded rights derived from federal law. Xerox's position – and the Second Circuit's decision – on this issue rests on a judicially created exception to this clear statutory principle. That is, cases interpreting this provision have found that "there is an exception to ERISA's anti-alienation provision for a knowing and voluntary waiver of retirement benefits that is executed to reach a settlement." *Rhoades v. Casey,* 196 F.3d 592, 598 (5th Cir. 1999); *see also Finz v. Schlesinger,* 957 F.2d 78, 82 (2nd Cir. 1992); cf. *Lynn v. CSX Transportation, Inc.*, 84 F.3d 970, 975 (7th Cir. 1996)(quoting *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 455 (7th Cir.1991)) (the anti-alienation provision "does not impose a bar on settlement agreements wherein pension claims are knowingly and intentionally resolved by employees").

The Second Circuit decision in this case applies a concept of "knowing and voluntary" that is considerably different from that applied in other

Circuits. Because of the importance of pension benefits and the practical implications of drawn out litigation, this is a question of extraordinary importance requiring the Supreme Court's attention.

ERISA § 102(a), 29 U.S.C. § 1022 requires Plan sponsors to provide Plan participants with a summary plan description ("SPD") informing the Participant in "a manner calculated to be understood by the average plan participant" of important information regarding benefits. The information that must be provided ncludes "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." ERISA § 102(b), 29 U.S.C. § 1022(b); *Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2d Cir. 2001) ("*Layaou 2001*").

The provision of the OWBPA captioned "Waiver," 29 U.S.C. § 626(f), begins by stating that "An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." That provision then sets forth standards for determining whether a waiver of claims under the ADEA is knowing and voluntary. The full provisions of 29 U.S.C. § 626 are lengthy and therefore are set out in Appendix E, pursuant to Supreme Court Rule 14.1(f). Appendix E also contains the text of 29 C.F.R. § 1625.22, a regulation promulgated by the Equal Employment Opportunity Commission to implement provisions of the OWBPA.

STATEMENT OF THE CASE

This litigation regarding the proper computation of benefits under Xerox's retirement plan has been winding its way through the courts for ten years. It was only when the petitioners finally won the day that Xerox contended that unrelated events occurring during this period made this a pyrrhic victory.

At the heart of this litigation are findings by the Second Circuit that the defendant-appellants failed to disclose information relating to the methodology to be used when calculating pension benefits for a category of Xerox employees rehired prior to publication of the 1998 SPD. Xerox's method was to offset the value of pension benefits accrued by the plaintiff subsequent to being rehired by a "phantom account" consisting of the hypothetical appreciated value of the distribution he had previously received. Based on arguments submitted by counsel for the *Frommert* plaintiffs as interveners, the Second Circuit found in *Layaou 2001*, 238 F.3d at 211, that rehired Xerox employees who had received a distribution of pension benefits when previously separated from employment were not properly informed of such offsets in SPDs published and distributed by the defendant-appellants during the period January 1, 1990 through the date of plaintiff Layaou's termination in 1995.

Based on this finding, the Second Circuit concluded that the Xerox defendants had violated ERISA Section 102(a), 29 U.S.C. § 1022(a), which provides that a SPD "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprize such participants and beneficiaries of their rights and obligations under the plan." *Layaou 2001*, 238 F.3d at 209 (quoting 29 U.S.C. § 1022(a)).

Five years later, in *Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006) ("*Frommert 2006*"), the Second Circuit found that the failure of the defendant-appellants to disclose the existence of the phantom account offset and their intent to implement same prior to publication of the 1998 SPD when calculating rehired plan participants' pension benefits since the date of their rehire violated ERISA Section 204(g), 29 U.S.C. § 1054(g). Because the defendant-appellants had failed to provide at least fifteen days' notice of the

amendment reflected in the 1998 SPD, the Second Circuit also held that the defendants had violated ERISA Section 204(h), 29 U.S.C. § 1054(h). *Id.*

The 2006 opinion of the Second Circuit did not establish the relief to be received by the petitioners for the defendant-appellants' statutory violations. Instead, the panel remanded this case back to the District Court and specifically directed the District Court to craft the appropriate relief employing equitable principles. *Id.* at 268. After hearing testimony and argument by the parties, the trial court on January 24, 2007 rendered an opinion finding that the methodology it had previously prescribed to recalculate the pension entitlement of plaintiff Layaou in *Layaou v. Xerox Corp.*, 330 F. Supp. 2d 297 (W.D.N.Y. 2004) ("*Layaou 2004*"), also should be used to recalculate the pension benefits due to the plaintiff-appellees and similarly situated Xerox rehires. *Frommert 2007*, 472 F. Supp. 2d at 458. That methodology, described as "the Layaou 2004 methodology," required the defendant-appellants to calculate the pension entitlement of each plan participant rehired prior to publication of the 1998 SPD with the only offset being the amount of the distribution such plan participant received when previously separated from employment. *Id.* at 458-459.

By the time the District Court made its decision on remand, many of the plaintiffs had retired under "reduction in force" ("RIF") severance agreements with Xerox and had signed a general release form as part of that severance. At the request of the plaintiff-appellees, the trial court carefully reviewed the release form in order to determine whether it was enforceable to bar the successful ERISA claims of the plaintiff-appellees. The trial court found that the release form which is the subject of this petition is an employer-drafted document executed by plan participants in exchange for severance pay that makes no mention of

this case or even the Xerox pension plan. *See id.* at 459-60. Moreover, the release form does include a paragraph which the trial court found carves out from its scope the employee's right to a lawfully calculated pension. The precise language of this paragraph, which is generally numbered paragraph 5, is as follows:

> I acknowledge and agree that the consideration set forth in this Release is *in addition* to anything of value to which I am entitled by law or Xerox policy.

(Emphasis added.) *Id.* at 460; Appendix F.

The trial court concluded that paragraph 5 of the release form was not capable of being understood by the average individual eligible to participate in a reduction in force. *Id.* at 462-63. Based on the principle of contract interpretation that such documents are to be strictly construed against the employer as drafter, the District Court held that the release form did not bar the plaintiff-appellees' ERISA claims. *Id.* at 466.

The trial court also concluded that the release form failed to comply with provisions of the OWBPA which hold that execution of a release form is not deemed to be knowing and voluntary if the waiver fails to be written in a manner calculated to be understood by the average individual eligible to participate in the reduction in force and if the amount paid in exchange for the release was less than the value of the employment discrimination claims waived.[1] *Id.* at 462-

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[1] Severance payments such as those made by Xerox to its employees in connection with a voluntary or involuntary reduction in force, because

63. In the course of rendering its opinion that the release form was unenforceable, the trial court observed in a footnote that, although

> noncompliance with the OWBPA does not automatically invalidate a release as to non-ADEA claims ... [t]hat does not make such noncompliance irrelevant, however. The requirements of the OWBPA were intended by Congress to ensure that an employee's waiver of his rights be "knowing and voluntary." Thus, an employer's tendering of consideration that does not exceed the value of anything to which the employee was already entitled is some evidence that the employee's waiver executed in exchange for that consideration was not knowing and voluntary.

Frommert 2007, 472 F. Supp. 2d at 463 n.5 (citations omitted).

The defendant-appellants appealed the rulings of the trial court that the Layaou 2004 methodology was the appropriate method of calculating the pension

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they are conditioned on the waiver of pension rights in a document not subject to negotiation, constitute a species of contract of adhesion -- a standardized agreement offered by an employer to its employee in circumstances where the latter has no real bargaining power and faces economic pressure because he has just lost his job. Where one party dictates the provisions of the agreement, "the other has no more choice in fixing those terms than he has about the weather." *See Siegelman v. Cunard White Star*, 221 F.2d 189, 205 (2d Cir. 1955) (Frank, J., dissenting).

entitlements of rehired plan participants and that the release form was unenforceable.

In a decision rendered July 24, 2008, the Second Circuit upheld the determination by the trial court that the Layaou 2004 methodology was within the trial court's discretion to grant as the relief for statutory violations by the defendant-appellants. *Frommert 2008*, 535 F.3d at 117. However, the same three-judge panel inconsistently vacated the trial court's determination that the release form did not bar the ERISA claims of the plaintiff-appellees. *Id.*

In an explanatory footnote, the Second Circuit stated that, although the trial court concluded that the release form failed to comply with a provision of the OWBPA and that such noncompliance was relevant to the determination of whether the plaintiff-appellees released Xerox from ERISA claims, "such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was 'knowing and voluntary.' " *Id.* at 122 n.4.

REASONS FOR ALLOWANCE OF THE WRIT

Despite the fact that, during ten years of litigation, the Seventh and Ninth Circuits, as well as the Second Circuit,[2] have found that the defendant plan administrators engaged in a course of administration that violated ERISA statutes designed to protect pensioners, the petitioners have not received one dollar of the enhanced pension benefits that should have been awarded to them. The conduct of the

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[2] *See Layaou 2001*; *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), *cert. denied* 167 L.Ed. 2d 321 (2007); *Berger v. Xerox Retirement Income Guarantee Plan*, 157 F.Supp. 2d 998 (S.D. Ill. 2001), *affirmed*, 338 F.3d 755 (7th Cir. 2003); and *Frommert 2006*.

defendant-appellants in delaying resolution of this dispute over the implementation of the phantom account offset is at cross-purposes with the express Congressional intent for the passage of ERISA, namely that "[i]f a worker has been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - he will actually receive it." *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 46 U.S. 359, 375 (1980).

This Court can take judicial notice that the recent economic slowdown has had particular impact on older workers and has put many retirees at the edge of poverty. *See, e.g.*, Appendix G, an AARP Research Report entitled "The Economic Slowdown's Impact on Middle-Aged and Older Americans." In context, Xerox's act of dragging out its unsuccessful claims in this litigation added significantly to the plight of its own employees in effect forcing many of them to accept the RIF packages.

The decision of the Second Circuit to vacate District Judge Larimer's holding that the Xerox general release form was unenforceable to bar the ERISA claims of the plaintiff-appellees turns on its head the federal common law concept that employer-drafted agreements are to be strictly construed against the drafter. Further, contrary to federal common law principles highlighted in this petition, the decision in *Frommert 2008* improperly places the burden on plan participants to establish that the release form was not a knowing and voluntary waiver of pension benefits that were vested pursuant to specific terms of ERISA. Indeed, the Second Circuit's holding that, during the course of this litigation, the value of the pension benefits waived was "indeterminate," *Frommert 2008*, 535 F.3d at 122, alone should suffice to affirm Judge Larimer's decision that the release form was unenforceable in light of the "totality of the circumstances" test set forth in *Laniok v. Brainerd*

Mfg. Co. Pension Plan, 935 F.3d 1360, 1368 (2d Cir. 1991).[3]

Unless this Court certifies the questions presented for review, the July 24, 2008 opinion of the Second Circuit could have grave and profound consequences on older workers, many of whom depended upon receiving the pension benefits promised to them by their employer to fund their retirement years. Vacation of the trial court's determination that the Xerox general release form is unenforceable to bar

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[3] The *Laniok* factors are as follows:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Laniok, 935 F.3d at 1368. These factors are similar to those applied in other Circuits. *See, e.g., Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1 (1st Cir. 2007); *Long v. Sears Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997); *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995); *Baptist v. City of Kankakee*, 481 F.3d 485 (7th Cir. 2007); *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998).

the otherwise successful ERISA claims of the plaintiff-appellees could result in widespread mischief. Employers will be encouraged to offer a nominal severance payment under vague terms designed to eliminate substantial pension benefits accrued over several years of service. Equally chilling, unless this Court grants *certiorari* and reverses the decision of the Second Circuit which is the subject of this petition, unscrupulous employers will be encouraged to defend indefensible positions of law, as the defendant-appellants have done in this case, simply to create periods of delay during which those employers will solicit execution of vague general release forms from cash-strapped plan participants so as to avoid their pension obligations.

II. PRINCIPLES OF CONTRACT INTERPRETATION UNDER FEDERAL COMMON LAW MANDATE REINSTATEMENT OF THE TRIAL COURT'S HOLDING THAT THE RELEASE FORM WAS UNENFORCEABLE TO BAR THE PETITIONERS' SUCCESSFUL ERISA CLAIMS

This Court has held that "bearing in mind the special nature and purpose of employee benefit plans [federal courts should] develop a federal common law of rights and obligations under ERISA-regulated plans." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989)). Consistent with the admonition of this Court that principles of federal common law should be developed to interpret ERISA-regulated plans, the plaintiff-appellees submit that a release form executed by a plan participant as part of a severance program while the employer drags out pension litigation should not be treated as a "knowing and voluntary" waiver of pension claims or rights where the form does not reference the ongoing

litigation and was not submitted to counsel for the plan participant as part of any settlement negotiations.

A principle of contract interpretation given the imprimatur of federal common law but ignored by the Second Circuit in *Frommert 2008* is that the validity of an individual's waiver of pension claims should be subjected to closer scrutiny than his waiver of general contract claims. *Finz v. Schlesinger*, 957 F.2d 78, 81 (2d Cir. 1992). This principle of contract interpretation was diligently followed by the District Court when it carefully reviewed the provisions of the release form deemed to be ambiguous and determined that the presence of those provisions mandated that the release form could not be enforced to bar the ERISA claims of the plaintiff-appellees.

Another principle of contract interpretation applicable to circumstances where the payment of severance pay is conditioned on the execution of a release form is that courts must ensure that federally protected rights are "not undermined by private agreements born of circumstances in which employees confront extreme economic pressures or lack information regarding their legal alternatives." *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 110 F.3d 431, 437 (7th Cir. 1997). There can be no more extreme economic pressure than that placed upon an older employee faced with a year without income.

A third principle of federal common law of relevance to this petition is that the SPD controls in the event of a conflict between the SPD and the plan document or the plan administrator's interpretation of the plan document. This principle has not yet been the subject of an opinion by this Court.[4] The rationale for

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[4] The concept that the SPD controls in the event of a conflict has been consistently applied

that legal principle is that the SPD "will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 112-13 (2d Cir. 2003).

Yet another principle of contract interpretation of federal common law germane to the issue of whether the Xerox release form bars plaintiff-appellees' otherwise meritorious claims is that a document drafted by the employer and alleged to be a waiver of pension rights must be construed in favor of the employee. *Perreca v. Gluck*, 295 F.3d 215, 223 (2d Cir. 2002) ("[A]ny ambiguity in the language used in an ERISA plan should be construed against the interests of the party that drafted the language").[5]

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outside the Second Circuit. S*ee Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981-83 (5th Cir. 1991); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998); *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994); *Bergt v. Ret. Plan for Pilots Employed by Mark Air*, 293 F.3d 1139 (9th Cir. 2003); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518-19 (10th Cir. 1996); *McNight v. Southern Life & Heath Co.*, 758 F.2d 1566 (11th Cir. 1985).

[5] In *Frommert 2008*, the Second Circuit acknowledged that four of the *Frommert* plaintiffs had inserted language in their release forms "to carve out explicitly their claims as members of the 'Frommert lawsuit' from the universe of claims to be covered by the release." *Frommert 2008*, 535 F.3d at 120 n.3. In the brief they submitted to the Second Circuit, the defendant-appellants stated that acceptance of the four altered release forms was done "inadvertently." Appendix H at 21 n.5 The

Application of the foregoing principles of contract interpretation under federal common law solves the riddle posed by paragraph 5 of the release form: what is the explanation of the phrase "by law or Xerox policy?" Breaking this phrase into its constituent parts, as determined by the trial court, the term "by law" refers to a pension calculated in accordance with ERISA without implementation of the phantom account offset. *Frommert 2007*, 472 F. Supp. 2d at 463. The term "Xerox policy" should be deemed to refer to the calculation of the pension entitlement of a plan participant consistent with the description by the defendant-appellants of how to calculate same contained in the 1989 SPD, which is the basis for the decision in *Frommert 2007* that the methodology to be followed when calculating pension benefits should be the Layaou 2004 methodology. As declared by the trial court:

> The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy.... Read that way, the releases would not bar plaintiffs' claims here. If plaintiffs were entitled to pension benefits under the law, *i.e.*, ERISA, or under Xerox's own policies, they did not waive their rights to such benefits.

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defendant-appellants thus clarified the fact that, in the ordinary case, they would not have accepted any releases which contained alterations. This was made clear in the August 8, 2006 memo addressed to plaintiff-appellee Frances Tobin, Appendix I, in which Xerox Human Resources Manager Mary Ann Mannix states "We are unable to accept your application with the change you added."

Id. at 462.

II. PRINCIPLES APPLYING TO DETERMINE IF WAIVERS ARE "KNOWING AND VOLUNTARY" UNDER THE OWBPA SHOULD ALSO APPLY TO DETERMINE WHETHER A WAIVER OF ERISA CLAIMS IS A KNOWING AND VOLUNTARY ACT BY EMPLOYEES FACED WITH TERMINATION

In *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998), this Court held that strict compliance with the OWBPA is applicable only to ADEA claims [6] However, employment discrimination claims such as those prohibited by the ADEA should not logically receive a higher degree of protection than an employee's contractual right to a pension. By this petition, this Court is requested, consistent with principles of contract interpretation under federal common law, to ensure that claims under ERISA be given the same protection this Court has given to ADEA claims when employees are asked to sign a release form deemed to be a waiver of both ADEA and ERISA claims in exchange for severance pay. Such an extension is natural since both bodies of law protect

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[6] This Court in *Oubre* held that failure to comply with any one provision of the OWBPA rendered an alleged waiver of ADEA claims invalid. *See Oubre*, 522 U.S. at 427. In sum, the petitioners ask this Court to apply the OWBPA to documents, such as the one at bar, which purport to waive both ADEA and ERISA claims.

employee rights and preclude waivers unless they are "knowing and voluntary."

The decision of the Second Circuit vacating Judge Larimer's well-reasoned opinion that the employer-drafted release form was unenforceable treads upon the equitable principle established under federal law that, absent clear error, appellate courts should defer to fact-intensive findings by trial courts. *Irons v. FBI*, 811 F.2d 681, 684 (1st Cir. 1987). Moreover, the decision of the Second Circuit implicitly imposes the burden of proving that the waiver is invalid on the plaintiff-appellees. Putting the burden on the employees to prove that the alleged waiver of ERISA benefits is invalid is contrary to regulations promulgated by the Equal Employment Opportunity Commission to implement provisions of the OWBPA stating that"the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary." 29 C.F.R. § 1625.22(h).

A release form is not effective under the OWBPA unless "the individual waives rights or claims only in exchange for adequate consideration in addition to anything of value to which the individual already is entitled." 29 U.S.C. § 626(f)(1)(D). The concept of what constitutes adequate consideration is the primary factor in determining whether a document alleged to be a release of employment claims under the ADEA is valid. *See EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1279-1280 (7th Cir. 1992). Consistent with the definitions contained in the ADEA — including a definition of "employer" similar to that contained in ERISA — this Court should find that, for a waiver of ERISA claims to be enforceable, the consideration paid in exchange for the waiver must exceed the benefits to which the employee was already entitled by contract or law.

Paragraph 5 of the release form mirrors a critical provision of the OWBPA, 29 U.S.C. § 626(f)(1)(D), which provides that "The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled." To cite from Judge Larimer's careful analysis of the enforceability of the release form, "This provision [paragraph 5] was presumably included in the release in order to conform to the requirements of the [OWBPA]." *Frommert 2007*, 472 F. Supp. 2d at 462.

Both the trial court and the Second Circuit applied the factors set forth in *Laniok*, 935 F.3d at 1368, to reach different conclusions. The Second Circuit concluded, contrary to principles of contract interpretation under federal common law to be applied to documents drafted by the employer, that the fact that the exact amount of claims or benefits deemed to be waived was "indeterminate" justified vacating the trial court's decision that the release form was unenforceable to bar the ERISA claims of the plaintiff-appellees. *Frommert 2008*, 535 F.3d at 122.

In support of its holding, the Second Circuit observed that "a settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty." *Frommert 2008*, 535 F.2d at 122. This observation is at odds with the following factual finding of the trial court: "In the case at bar, it appears that, at least with respect to some of the plaintiffs, the consideration received by the plaintiffs, *i.e.*, salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset." *Frommert 2007*, 472 F. Supp. 2d at 464.[7]

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[7] In its opinion, the trial court noted the substantial inadequacy of the consideration paid to

As reflected by the conflicting decisions in *Frommert 2007* and *Frommert 2008*, paragraph 5 of the release form unquestionably lacks the clarity required by both the *Laniok* factors and the OWBPA. If this Court adopts, as a matter of federal common law, the OWBPA factors as the criteria to be utilized by federal courts when interpreting employer-drafted waivers of ERISA claims, such as the release form at issue, the result will be one consistent, predictable finding as to the enforceability of such putative waivers of ERISA claims.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that the Supreme Court grant review of the

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plaintiff Kenneth Pietrowski, who signed the release form. The trial court found that the lump sum equivalent of his standard RIGP annuity is more than $832,000, from which $210,000 (representing the amount of the distribution he received when first separated from employment and the amount of severance pay he received) was deducted to determine that plaintiff Pietrowski waived $622,000 by execution of the employer drafted release form. *Frommert 2007*, 472 F. Supp. 2d at 464. The trial court relied on a Xerox RIGP Plan Pension Calculation Statement dated January 31, 2006. Appendix J.

important questions presented.

Dated: December 22, 2008

Respectfully submitted,

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APPENDIX A

PAUL J. FROMMERT, ALAN H. CLAIR, DONALD S. FOOTE, THOMAS I. BARNES, RONALD J. CAMPBELL, FRANK D. COMMESSO, WILLIAM F. COONS, JAMES D. GAGNIER, BRIAN L. GAITA, WILLIAM J. LADUE, GERALD A. LEONARDO JR., FRANK MAWDESLEY, HAROLD S. MITCHELL, WALTER J. PETROFF, RICHARD C. SPRING, PATRICIA M. JOHNSON, F. PATRICIA M. TOBIN, NANCY A. REVELLA, ANATOLI G. PUSCHKIN, WILLIAM R. PLUMMER, MICHAEL J. MCCOY, LARRY J. GALLAGHER, NAPOLEON B. BARBOSA, ALEXANDRA SPEARMAN HARRICK, JANIS A. EDELMAN, PATRICIA H. JOHNSTON, KENNETH P. PARNETT, JOYCE D. CATHCART, FLOYD SWAIM, JULIE A. MCMILLIAN, DENNIS E. BAINES, RUBY JEAN MURPHY, MATTHEW D. ALFIERI, KATHY FAY THOMPSON, MARY BETH ALLEN, CRAIG R. SPENCER, LINDA S. BOURQUE, THOMAS MICHAEL VASTA, FRANK C. DARLING, CLARK C. DINGMAN, CAROL E. GANNON, JOSEPH E. WRIGHT, DAVID M. ROHAN, DAVID B. RUDDOCK, CHARLES HOBBS, CHARLES ZABINSKI, CHARLES J. MADDALOZZO, JOYCE M. PRUETT, WILLIAM A. CRAVEN, MAUREEN A. LOUGHLIN JONES, KENNETH W. PIETROWSKI, BONNIE COHEN, LAWRENCE R. HOLLAND, GAIL A. NASMAN, STEVEN D. BARLEY, DONNA S. LIPARI, ANDREW C. MATTELIANO, MICHAEL HORROCKS, CANDICE J. WHITE, DENNIS E. BAINS, KATHLEEN E. HUNTER, JOHN L. CRISAFULLI, DEBORAH J. DAVIS, BRENDA H. MCCONNELL, KATHLEEN A. BOWEN, ROBERT P. CARANDDO, TERENCE J. KURTZ, WILLIAM J. CHESLOCK, THOMAS E. DALTON, LYNN BARNSDALE, BRUCE D. CRAIG, GARY P. HARDIN, CLAUDETTE M. LONG, DALE PLATTETER, MARY ANN SERGEANT, MOLLY WHITE KEHOE, IRSHAD QUERSHI, DAVID K. YOUNG, LESLIE ANN WUNSCH, EUGENE H.

UPDYKE, MICHAEL R. BENSON, ALVIN M. ADAMS, RONNIE KOLNIAK, JAMES J. FARRELL, ROBERT L. BRACKHAHN, BENJAMIN C. ROTH, RICHARD C. CARTER, CARMEN J. SOFIA, KATHLEEN W. LEVEA, FREDERICK SCACCHITTI, PAUL DEFINA, JAMES G. WALLS, GAIL J. LEVY, JOHN A. WILLIAMS, CRYSTAL THORTON, CHARLES R. DRANNBAUER, WILLIAM M. BURRITT, and JANICE ROSS HEILER, Plaintiffs-Appellees, -v.- SALLY L. CONKRIGHT, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, PATRICIA M. NAZEMETZ, XEROX CORPORATION PENSION PLAN ADMINISTRATOR, LAWRENCE M. BECKER, XEROX CORPORATION PLAN ADMINISTRATOR, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, and XEROX CORPORATION, A NEW YORK CORPORATION, Defendants-Appellants, XEROX CORPORATION, Defendant.

Docket No. 07-0418-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

535 F.3d 111; 2008 U.S. App. LEXIS 15585; 44 Employee Benefits Cas. (BNA) 1461

June 19, 2008, Argued
July 24, 2008, Decided

PRIOR HISTORY: [**1]

Appeal from a January 24, 2007 order of the United States District Court for the Western District of New York (David G. Larimer, Judge) complying with our January 6, 2006 decision to remand the case to the District Court in order to craft a remedy to calculate Plaintiffs-Appellees' pension benefits in light of the violations we identified of the Employee Retirement

Income Security Act of 1974, *29 U.S.C. § 1001 et seq.* We conclude that the District Court crafted a remedy consistent with our decision, applicable law, and the terms of the pension plan at issue. However, we also conclude that the District Court erred in refusing to enforce the release forms signed by several Plaintiffs-Appellees in this litigation.
Frommert v. Conkright, 472 F. Supp. 2d 452, 2007 U.S. Dist. LEXIS 5044 (W.D.N.Y., 2007)

DISPOSITION: Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

COUNSEL: ROBERT H. JAFFE (Mark B. Watson, Robert H. Jaffe & Associates, Springfield, New Jersey; George A. Schell, Schell & Schell, Fairport, New York; John A. Strain, Rodondo Beach, California, on the brief), Robert H. Jaffe & Associates, Springfield, New Jersey, for Plaintiffs-Appellees.

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MARGARET A. CLEMENS, [**2] Nixon Peabody LLP, Rochester, New York, for Defendants-Appellants.

Maria Ghazal, Business Roundtable, Washington, D.C.; Jeffrey A. Lamken, Rachel M. McKenzie, Baker Botts LLP, Washington, D.C.; Allyson N. Ho, Baker Botts LLP, Dallas, Texas, for Amicus Curiae Business Roundtable.

JUDGES: Before: STRAUB and RAGGI, Circuit Judges, and SESSIONS, District Judge.*

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*The Honorable William K. Sessions III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

OPINION BY: STRAUB
OPINION

[*115] STRAUB, Circuit Judge:

Plaintiffs-Appellees asserted claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), *29 U.S.C. § 1001 et seq.*, against their current or former employer, Xerox Corporation ("Xerox"),1 the pension plan administered for the benefit of its employees, and various individuals associated with the administration of that plan. On remand from our first decision in this litigation, *see Frommert v. Conkright, 433 F.3d 254 (2d Cir. 2006)*, the District Court crafted a remedy to address the ERISA violations we had identified and concluded that the release forms signed by several Plaintiffs-Appellees did not bar their ERISA claims, *see Frommert v. Conkright, 472 F. Supp. 2d 452, 456-59 (W.D.N.Y. 2007)*. [**3] Defendants-Appellants challenge both aspects of the District Court's decision. For the reasons set forth below, we reject Defendants-Appellants' first challenge and agree with the second. Accordingly, we vacate a portion of the District Court's order and remand the case to the District Court for proceedings consistent with this opinion. 1 Early in this litigation, the District Court dismissed Xerox as a party, and Plaintiffs-Appellees did not challenge this dismissal in their appeal. *See Frommert v. Conkright, 433 F.3d 254, 256 n.2 (2d Cir. 2006)*.

FACTUAL AND PROCEDURAL BACKGROUND

We presume familiarity with the facts and procedural history of this case as set forth in our prior decision, *see Frommert, 433 F.3d at 257-62*, and we repeat them here only as relevant to the issues presented in this appeal. In that decision, we concluded that Defendants-Appellants had impermissibly amended the ERISA plan at issue through their method of determining retirement benefits for those beneficiaries who had previously left

the company only to be rehired later. *Id. at 264-68.* When these beneficiaries left Xerox, they all received lump-sum distributions of their then-accrued pension benefits. *Id. at 257.*

The [**4] pension benefits of those who were subsequently rehired by Xerox were governed by a set of ambiguous provisions in the pension plan documents. The 1989 Xerox Retirement Income Guarantee Plan ("RIGP" or "Plan") provided that, "[i]n the event any part or all of a Member's accrued benefit is distributed to him prior to his Normal Retirement Date, . . . and such member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution." 1989 RIGP § 9.6. The 1997 version of the Plan provided both that "[n]o credit shall be given [to a participating employee] for any period with respect to which a lump sum payment has been made . . ." and that "Credit for Years of Participation preceding [such a payout] will be reinstated" in the event that such an employee returns to Xerox." *Frommert, 433 F.3d at 260.* Thus, in determining these employees' benefits, the plan administrator was required to account, in a manner unspecified to employees, for both an employee's total years of service at Xerox and the fact that the final benefits must be "offset by" [**5] an amount "attributable" to a prior lump sum distribution.

The plan administrator resolved this difficulty by utilizing a so-called "phantom account" offset mechanism. The phrase "phantom account" refers to the calculation of the current value of the employee's prior, lump-sum distribution by adjusting that amount for "hypothetical investment gains and/or losses attributable to the prior distribution, as if the money had been [*116] left in [the employee's] account[]" instead of being distributed to the employee upon first leaving Xerox. *Id. at 259* (quoting 1995 "Benefits Update"). In estimating the pension benefit to which

that employee would be entitled upon his or her future retirement (and thus second separation) from Xerox employment, the plan administrator would both account for the employee's total years of service and deduct an amount based on the prior, lump-sum distribution, as augmented by the "phantom account" offset method. *See id. at 259-61.*

In our first decision, we concluded that the "phantom account" offset mechanism constituted a "retroactive cut-back" of anticipated pension benefits in violation of *29 U.S.C. § 1054(g)*, and that Defendants-Appellants had impermissibly amended [**6] the ERISA Plan to include that mechanism in violation of *29 U.S.C. § 1054(h)*. *See id. at 266-68.* We remanded to the District Court to fashion a remedy for these violations. *See id. at 268.* Specifically, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. In addition, we recognized that the District Court could apply the "phantom account" offset mechanism to employees hired after the 1998 amendment to the Plan because those individuals were on notice as to the mechanism's existence. *Id. at 268-69. But see Miller v. Xerox Corp. Retirement Income Guarantee Plan, 464 F.3d 871 (9th Cir. 2006)* (holding that Plan's "phantom

account" methodology itself violates ERISA), [**7] *cert. denied, 127 S. Ct. 1829, 167 L. Ed. 2d 321 (2007).*

Acknowledging our guidance to employ "equitable principles" and reviewing the language of the Plan materials, the District Court concluded that the appropriate remedy for employees hired before the 1998 amendment was to direct the plan administrator to pay each of these individuals "a lump sum in the amount of the difference between the amount of benefits that [an employee] has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'[1] *Frommert, 472 F. Supp. 2d at 458* (internal quotation marks omitted). The District Court also stated that "it would not be unreasonable for the administrator to subtract out the amount of the prior distribution" in order to prevent such employees from receiving windfalls. *Id.* (alterations and internal quotation marks omitted).

In addition, the District Court concluded that [**8] the release forms signed by several Plaintiffs-Appellees in exchange for their receiving severance pay from Xerox did not release Defendants-Appellants from the ERISA-based claims asserted in this litigation. *See id. at 460-65.* Other matters addressed by the District Court on remand are not relevant to this appeal, which timely followed.

[*117] DISCUSSION

On appeal, Defendants-Appellants raise two challenges to the District Court's decision. First,

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[1] The District Court presumed that the parties would be able to agree on which employees had full notice of the "phantom account offset" mechanism because they were rehired after the 1998 Summary Plan Description ("SPD") had been issued. *See Frommert v. Conkright, 472 F. Supp. 2d 452, 459 (W.D.N.Y. 2007).*

Defendants-Appellants argue that the District Court fashioned an improper remedy for the ERISA violation associated with the implementation of the "phantom account offset" mechanism. Second, Defendants-Appellants argue that the District Court erroneously decided that the release forms signed by certain Plaintiffs-Appellees did not bar their ERISA-based claims. For the reasons that follow, we agree with Defendants-Appellants that the release forms at issue bar the signatories' ERISA claims, but we will not disturb the District Court's chosen remedy.

I. Remedy

On appeal, Defendants-Appellants challenge the District Court's remedy for the ERISA violations we identified in our prior decision, *i.e.*, the impermissible amendment of the ERISA plan at issue [**9] to calculate Plaintiffs-Appellees' pension benefits according to a "phantom account" offset method. As discussed above, we instructed the District Court as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Frommert, 433 F.3d at 268. We review a district court's chosen remedy of an identified ERISA violation

for an excess of allowable discretion. *See Chao v. Merino, 452 F.3d 174, 185 (2d Cir. 2006).*

Here, the Plan accounts for a retiring employee's total years of working at Xerox, but it also provides that an employee's benefits must "be offset by the accrued benefit attributable to [a prior distribution]." RIGP § 9.6. Plaintiffs-Appellees all received earlier, lump-sum distributions of their pension [**10] benefits when they first left their employment at Xerox, and the basic question presented to the District Court was how to ensure that these individuals received their due benefits in light of the ambiguous non-duplication of benefits provision. *See Frommert, 472 F. Supp. 2d at 457-58* (construing and applying § 9.6 of 1989 Plan). On remand, the District Court decided that the appropriate remedy was to order the plan administrator to recalculate the relevant Plaintiffs-Appellees' benefits to deduct only the nominal value of their prior, lump-sum distributions, *i.e.,* without a "phantom account" adjustment reflecting hypothetical investment gains or, apparently, any other adjustment to reflect the inflation-adjusted values of the prior distributions. *See id. at 458-59.*

Defendants-Appellants fail to establish that the District Court's approach violated either the Plan terms or any law. Although Defendants-Appellants contend that the District Court failed to utilize pre-1998 Plan terms, the District Court explicitly did so but simply applied those terms to Plaintiffs-Appellees differently than Defendants-Appellants proposed. In advocating their proposed "new hire" approach instead of the [**11] remedy crafted by the District Court, Defendants-Appellants argue that § 1.44(f) of the 1989 Plan requires that a rehired employee who then retires is entitled only to a pension benefit that accounts for his or her years of service [*118] since being rehired; the prior years of service are relevant only for the purpose of "vesting." However, in advocating this "new hire" method, Defendants-Appellants ignore the terms

of the 1989 Plan, which is silent as to prior lump-sum distributions pursuant to § 8.2. To the extent that the 1997 Plan applies to certain Plaintiffs-Appellees, Defendants-Appellants ignore the language of § 1.45(f). *See Frommert, 433 F.3d at 258-60* (discussing such provisions in the various versions of the Plan). Defendants-Appellants have failed to demonstrate that the District Court exceeded its allowable discretion in crafting its chosen remedy instead of adopting Defendants-Appellants' proposed approach.[2]

Alternatively, Defendants-Appellants contend that the District Court erred by failing to adopt the remedy proposed by the plan administrator or, at least, by failing to remand to the administrator the task of fashioning a remedy. Regarding the failure of the District Court to remand to the plan administrator, it does not appear from the record that Defendants-Appellants actually requested such relief from the District Court. As such, they have waived the issue for appeal. *See Allianz Ins. Co. v. Lerner, 416 F.3d 109, 114 (2d Cir. 2005)* ("It is a well-established general rule that an appellate court will not consider an issue

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[2] Defendants-Appellants also argue that the District Court's remedy confers a "windfall" on Plaintiffs-Appellees in violation of equitable principles. *See, e.g., Prudential Ins. Co. v. S. S. American Lancer, 870 F.2d 867, 871 (2d Cir. 1989)* ("[E]quity, we believe, abhors [**12] a windfall."). However, in contrast to *Prudential Insurance*, we do not view the remedy crafted by the District Court to be "wholly unjust" here because Defendants-Appellants wrote the terms of the ERISA Plan in an ambiguous and occasionally self-contradictory fashion. *Cf. Lifson v. INA Life Ins. Co. of N.Y., 333 F.3d 349, 353 (2d Cir. 2003)* (per curiam) (noting that, in interpreting an ERISA plan, a court "construe[s] ambiguities against the drafter and in favor of the beneficiary").

raised for the first time on appeal." (alterations and internal quotation marks [**13] omitted)).

Even if Defendants-Appellants had not waived the remand issue, we would review the District Court's decision to fashion a remedy itself instead of remanding to the plan administrator for an excess of allowable discretion. *See Zervos v. Verizon N. Y., Inc., 277 F.3d 635, 648 (2d Cir. 2002); Kinek v. Paramount Commc'ns, Inc., 22 F.3d 503, 508 (2d Cir. 1994).* The District Court here did not exceed its allowable discretion in this regard. Although we did not prohibit the District Court from remanding the case to the plan administrator, the language in our prior opinion presumed that the District Court would craft the remedy itself. *See Frommert, 433 F.3d at 268.*

Moreover, Defendants-Appellants had ample opportunity to explain fully the approach proposed by the plan administrator before the District Court, and did so, in their briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and accompanying testimony from an independent actuary who analyzed the plan administrator's approach. Indeed, Defendants-Appellants identify nothing that might have been gained by the District Court's remanding the matter to the plan administrator. *See Krauss v. Oxford Health Plans, Inc., 517 F.3d 614, 630 (2d Cir. 2008)* [**14] (stating that plaintiffs were not entitled to administrative remand where doing so would have been "futile"); *Miller v. United Welfare Fund, 72 F.3d 1066, 1071 (2d Cir. 1995)* (stating that remand to a plan administrator is not required where such additional proceedings would be a "useless formality" (internal quotation marks omitted)). In addition, we suggested, as "guidance for [*119] the district court," that it "may wish to employ equitable principles." *See Frommert, 433 F.3d at 268.* Defendants-Appellants identify no equitable principles that a district court might be employing, immediately upon remand from a circuit court, in merely performing the ministerial

function of then remanding a case to an ERISA plan administrator.

Defendants-Appellants rely on *Miller v. United Welfare Fund* to argue that remand is appropriate when "reasonable minds could differ as to the outcome of the case." However, we directed the district court in *Miller* to remand the case to the plan administrator to permit the plan administrator to gather additional evidence relevant to the nursing care sought by the claimant. *See id.* Here, we did not anticipate any comparable, extensive fact finding, and none occurred on [**15] remand before the District Court. Indeed, the only "evidence" considered by the District Court consisted of expert testimony regarding which of various proposed remedies was the most fair and equitable. Given the apparent lack of any benefit to remanding the case to the plan administrator and the language in our prior decision implying that the District Court should fashion its own remedy, *see id. at 268-69*, we cannot conclude that the District Court exceeded its allowable discretion in actually doing so.

In the alternative, Defendants-Appellants argue that the District Court erred in failing to adopt the plan administrator's proposed approach, or at least consider it under a deferential standard of review. We have held that where the ERISA plan confers upon the plan administrator discretionary authority to "construe the terms of the plan," the district court should review a decision by the plan administrator under an excess of allowable discretion standard. *See Nichols v. Prudential Ins. Co. of Am., 406 F.3d 98, 108 (2d Cir. 2005)* (citing *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)).* However, the District Court here had no decision to review because the plan administrator [**16] never rendered any decision other than the original benefit determinations, all of which were premised on the now impermissible "phantom account" offset mechanism. *See id. ("[W]e* may give deferential review only to actual exercises of discretion.").

Defendants-Appellants have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.

To the extent that Defendants-Appellants argue that the District Court erred by instructing the plan administrator to calculate benefits by deducting the nominal value of prior distributions denominated in 1980s dollars from accrued benefits denominated in current dollars, *see Appellants' Br.* at 38-41, we reject their argument for reasons similar to those applicable to their arguments on behalf of their own preferred "new hire" remedy. The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. [**17] As Defendants-Appellants wrote a pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several reasonable alternatives. *Cf. Lifson v. INA Life Ins. Co. of N. Y., 333 F.3d 349, 353 (2d Cir. 2003)* (per curiam) (instructing that a court should [*120] construes ambiguities in plan terms against the drafter of the ERISA plan).

II. Releases of Certain Plaintiffs' ERISA Claims

The final issue raised in this appeal is Defendants-Appellants' argument that the District Court erred in ruling that the release forms signed by several Plaintiffs-Appellees did not apply to the ERISA claims asserted in this litigation.[3] The releases at issue

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[3] The District Court stated that [**18] twenty-two of the named Plaintiffs signed release

provided that the signing employee "release[s] Xerox from any and all claims . . . based on anything that has occurred prior to the date [he or she] sign[s] this Release" in exchange for up to fifty-two weeks of salary continuance. In addition, the form specifies several potential federal claims, including those based in ERISA, that the release covers.

As a threshold matter, Plaintiffs-Appellees argue, for the first time in this appeal, that Defendants-Appellants may not rely upon the release forms signed by several Plaintiffs-Appellees because *Federal Rule of Civil Procedure 17(a)* requires that an action in federal court "be prosecuted in the name of the real party in interest." Although Defendants-Appellants are the pension plan at issue in this litigation and its administrators, Plaintiffs-Appellees argue that only Xerox Corporation has a "sufficient stake in reversing the trial court's ruling that the Xerox general release [**19] form constitutes a waiver of ERISA claims by the releasee." *Appellees' Br.* at 39. As noted above, the District Court dismissed Xerox early in this litigation, and Plaintiffs-Appellees did not appeal this ruling. *See Frommert, 433 F.3d at 256 n.2.* Moreover, Plaintiffs-Appellees did not challenge the authority of Defendants-Appellants to rely upon the releases below and thus have waived this argument for purposes of this appeal. *See Rogers v. Samedan Oil Corp., 308 F.3d*

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forms, but that four of these amended their forms to carve out explicitly their claims as members of the "Frommert lawsuit" from the universe of claims to be covered by the release. *See Frommert, 472 F. Supp. 2d at 460.* On appeal, Defendants-Appellants do not challenge the District Court's conclusion that these individuals' release forms did not cover their ERISA claims in this action. As a result, we will not disturb the District Court's conclusion that the release forms do not bar the ERISA claims asserted by these four Plaintiffs-Appellees in this litigation.

477, 482-84 (5th Cir. 2002) (affirming district court's ruling that third-party defendant had waived real-party-in-interest defense by failing to assert it until the day before trial); *Richardson v. Edwards, 326 U.S. App. D.C. 429, 127 F.3d 97, 99 (D.C. Cir. 1997)* (deeming real-party-in-interest defense waived when not raised until appellate proceedings).

Even if Plaintiffs-Appellees had not waived this argument, their real-party-in-interest argument is meritless because the release form itself defines its reference to "Xerox" to include "'the Xerox employee benefit plans'" in which the employee had participated or was then participating. *See Frommert, 472 F. Supp. 2d at 460 n.2* (quoting release forms). Moreover, Defendants-Appellants are not [**20] the parties *prosecuting* this action; that role belongs to Plaintiffs-Appellees. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1542 (2d ed. 1990) ("[T]he real party in interest principle . . . directs attention to whether [the] plaintiff has a significant interest in the particular action he has instituted, and *Rule 17(a)* is limited to plaintiffs."). *Cf. Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B. V. v. Schreiber, 407 F.3d 34, 49 (2d Cir. 2005)* (holding that a *Rule 17(a)* defect may not [*121] be cured by the joinder, as nominal defendants, of the real parties in interest to the action where those parties have evinced no intention of prosecuting the action). Thus, Plaintiffs-Appellees' real-party-in-interest argument fails.

As to the merits of Defendants-Appellants' arguments regarding the releases, "an individual can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver 'is made knowingly and voluntarily.'" *Finz v. Schlesinger, 957 F.2d 78, 82 (2d Cir. 1992)* (quoting *Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1365 (2d Cir. 1991)).* [**21] We have articulated several factors as relevant to the determination of

whether such a waiver is knowing and voluntary:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.
>
> . . . [T]his list of factors [is] not exhaustive . . . .

Id. (internal citation omitted). A court should consider the "totality of the circumstances" in determining whether a waiver of ERISA rights is knowing and voluntary. *Id.*

Despite acknowledging the explicit and broad language in the release form, the District Court concluded that the instant ERISA claims were not covered due to perceived deficiencies related to "the clarity of the release and the consideration [**22] given by Xerox in exchange for the releases." *Frommert, 472 F. Supp. 2d at 461-62.* Specifically, the District Court focused on one paragraph in which the signing employee agrees that "the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy." The District Court concluded that this language meant that the employee was not waiving his or her ERISA claim:

> The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was not waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.
>
> . . .
>
> Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according to a particular formula, that is a distinction without a difference here, because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction [**23] of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA. In other words, those employees were "entitled by law" not simply to receive some pension benefits, but to have their benefits calculated without any reduction attributable to a "phantom" account.

Id. at 462 (footnote omitted; emphasis in original).

[*122] In reaching this conclusion, the District Court appears to have conflated the existence of consideration adequate to render a release enforceable

with the scope of claims thereby released.[4] The paragraph on which the District Court focused provided only that the consideration for the release, *i.e.,* the salary continuance, did not replace any benefits, including pension benefits, to which the employee was already entitled. However, there is no allegation that Defendants-Appellants violated this term of the contract by denying these Plaintiffs-Appellees any and all pension benefits to which they would have been entitled. To the contrary, counsel for Defendants-Appellants represented to this Court at oral argument that several of these Plaintiffs-Appellees had already received pension benefits, albeit calculated [**24] under the "phantom account" offset

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[4] The District Court also appears to have concluded that the releases failed to comply with a provision of the Older Workers Benefit Protection Act ("OWBPA"), *29 U.S.C. § 626(f)*, and that such noncompliance has relevance to the determination of whether these Plaintiffs-Appellees released Xerox from ERISA-based claims. *See Frommert, 472 F. Supp. 2d at 463 n.5. Section 626(f)* specifies several facts that must exist in order to render waiver of claims asserted under the Age Discrimination in Employment Act ("ADEA"), *29 U.S.C. § 621 et seq.,* both "knowing and voluntary." We need not and do not decide whether the release forms complied with the requirements of the OWBPA because such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was "knowing and voluntary." *See Chaplin v. NationsCredit Corp., 307 F.3d 368, 375 (5th Cir. 2002)* ("[T]he OWBPA . . . applies only to ADEA claims."); *see also Tung v. Texaco Inc., 150 F.3d 206, 208-09 (2d Cir. 1998)* (per curiam) (concluding that plaintiff's waiver of his Title VII claims was knowing and voluntary despite the employer's noncompliance with § 626(f) requirements [**25] applicable to his ADEA claims).

method.

At bottom, neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs-Appellees likely expected at that time can render these releases unenforceable. As the method used to calculate pension benefits for rehired employees was, and has continued to be, disputed throughout this litigation, the precise amount of benefits that an employee signing a release would have received in the absence of such a release was always indeterminate. Plaintiffs-Appellees who signed these releases did so before the District Court crafted its remedy for the ERISA violations we identified. The mere fact that the anticipated recovery associated with ongoing litigation is uncertain does not render an employee's release of claims asserted in that litigation unenforceable. *Cf. Anita Founds., Inc. v. ILGWU Nat'l Ret. Fund, 902 F.2d 185, 189 (2d Cir. 1990)* ("[A] settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty.").

Applying the factors we have articulated as relevant to the issue [**26] of whether a waiver of ERISA rights was knowing and voluntary and reviewing the undisputed facts pertaining to these releases under the totality of the circumstances, *see Finz, 957 F.2d at 82*, we conclude that the District Court erred in holding that the releases at issue were unenforceable. There appears to be no dispute that those Plaintiffs-Appellees who signed these releases had ample time (45 days) to decide whether to sign the release, that Xerox encouraged such individuals to consult an attorney, and that the signatories received salary continuances in consideration of their releasing claims. Some Plaintiffs-Appellees even modified the terms of the release forms with which they had been [*123] presented before signing them. As to the language of the releases themselves, we cannot

conclude, as the District Court did, that the express terms of these releases were "at the very least ambiguous as to what the employee was giving up in exchange for salary continuance." *Frommert, 472 F. Supp. 2d at 462.* As the District Court's interpretation of the release forms is incorrect, it cannot stand. Unless the release form at issue specifically exempted this litigation as noted above, the releases [**27] signed by certain Plaintiffs-Appellees are enforceable.

CONCLUSION

For the foregoing reasons, we VACATE that portion of the order of the District Court holding that eighteen release forms are unenforceable, AFFIRM that portion of the order crafting a remedy for the identified ERISA violations, and REMAND the case for proceedings not inconsistent with this opinion.

APPENDIX B

PAUL J. FROMMERT, et al., Plaintiffs, v. SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ AND LAWRENCE M. BECKER, XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN ADMINISTRATORS AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, Defendants.

00-CV-6311L

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

472 F. Supp. 2d 452, 2007 U.S. Dist. LEXIS 5044, 39 Employee Benefits Cas. (BNA) 2529

January 24, 2007, Decided
January 24, 2007, Filed

SUBSEQUENT HISTORY: Stay granted by, Motion denied by *Frommert v. Conkright, 2007 U.S. Dist. LEXIS 15370 (W.D.N.Y., Mar. 6, 2007)*
Affirmed in part and vacated in part by, Remanded by *Frommert v. Conkright, 2008 U.S. App. LEXIS 15585 (2d Cir. N.Y., July 24, 2008)*

PRIOR HISTORY: *Frommert v. Conkright, 433 F.3d 254, 2006 U.S. App. LEXIS 250 (2d Cir. N.Y., 2006)*

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For Xerox Corporation Retirement Income Guarantee Plan, Xerox Corporation, a New York Corporation, Consol Defendants: Margaret A. Clemens, LEAD ATTORNEY, Nixon Peabody LLP, Rochester, NY.

JUDGES: DAVID G. LARIMER, United States District Judge.

OPINION BY: DAVID G. LARIMER

OPINION

[*455] DECISION AND ORDER

INTRODUCTION

This decision constitutes the latest chapter in a long-running dispute between employees of Xerox Corporation and administrators of Xerox's retirement plan, the Xerox Corporation Retirement Income Guarantee Plan ("the Plan"), concerning calculation of retirement benefits. The dispute involves a relatively small group of employees who previously left employment at Xerox, received a lump-sum distribution upon their initial departure, and then were rehired by Xerox years later. Those employees are now contemplating retirement, or have retired, and the issue in dispute is how their present retirement benefits should be calculated.

With respect to this group of rehired employees, the

Plan is designed so that an employee's total [**4] years of employment at Xerox, regardless of whether there was a break in service, are counted in calculating the employee's retirement benefits. Generally, the relevant pension calculations are based on the employee's total years of employment times a percentage of the employee's five highest-paying calendar years with Xerox. Both sides in this litigation agree that to avoid duplication of benefits, some sort of offset against current benefits is necessary to reflect the employee's receipt of monies at the time of the prior separation from employment. Just how that offset against current benefits should be calculated, though, has been a matter of much dispute and has engendered a great deal of litigation.

Familiarity with this Court's several prior decisions involving these parties, *see 328 F.Supp.2d 420 (W.D.N.Y. 2004)*; *206 F.Supp.2d 435 (W.D.N.Y. 2002)*, and also the Second Circuit's decision of January 6, 2006, *433 F.3d 254* ("Second Circuit decision") is presumed. These decisions set out in great detail the relevant facts and disputed issues between the parties. There is, therefore, no need to restate those matters here.

The Second Circuit [**5] decision, which was on an appeal from two of this Court's prior decisions dismissing some of plaintiff's claims and granting summary judgment in favor of defendants on the remaining claims, resolved many of the issues raised between the parties. The Second Circuit affirmed in part, reversed in part, and remanded the case to this Court for further proceedings.

[*456] The Second Circuit held that the Plan's use of a so-called phantom account in determining present benefits violated the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § 1101 et seq.*, in several respects. First, the Plan's formula constituted a "retroactive cut-back" of benefits, *433 F.3d at 268*, contrary to § 204(g) of ERISA. In addition, the court

found that employees were not given proper notice in the Summary Plan Description ("SPD") of the nature and scope of the phantom account, at least prior to 1998, when the SPD was amended to include the phantom account and describe the offset procedure. *Id. at 263, 269.*

The Second Circuit determined that employees rehired after 1998 had sufficient notice as to the manner by which Xerox intended to treat their [**6] previous distribution. For those rehired prior 1998, though, the Second Circuit remanded to this Court and directed me to "utilize an appropriate pre-amendment [1998] calculation," *id. at 268*, without using the "phantom account," to determine current benefits.

Specifically, the Second Circuit directed as follows:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the Court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation in fashioning the appropriate remedy.

Id.

Subsequent to the Second Circuit's decision, the Court met with counsel to determine how best to proceed. The parties agreed to work together to see if they could resolve the issues remaining on remand. Although the parties appear to have spent some time attempting to reach a settlement, it is now apparent

that [**7] they are unable, or unwilling, to settle.

The Court conducted a two-day hearing on the remedial issues raised by the Second Circuit and has received both pre-hearing and post-hearing memoranda from both sides. The parties have also discussed several cases from other jurisdictions dealing with similar issues. Having considered both sides' submissions and arguments, the Court now issues this Decision and Order concerning the issues before it on remand.

DISCUSSION

I. The Appropriate Calculation of Plaintiffs' Benefits

This Court's task on remand is made easier in many respects by the breadth of the Second Circuit decision. The Circuit resolved many issues and has clearly established the law of the case in many respects. For example, it can no longer be disputed that employees were not give proper notice in either the Plan or the relevant SPD as to the nature of the phantom account and its operation. Utilization of this phantom account or anything similar to it has been soundly rejected by the Court of Appeals in this case as well as a previous case involving the same Plan, *Layaou v. Xerox Corporation, 238 F.3d 205 (2d Cir. 2001)*. Other courts have [**8] reached the same conclusion. *Miller v. Xerox Corp. Ret. Income Guarantee Plan, 464 F.3d 871 (9th Cir. 2006)*; *Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755 (7th Cir. 2003)*. It is clear, then, that Xerox may not lawfully use the phantom account mechanism, as to either [*457] the named plaintiffs in this lawsuit, or anyone else who was rehired by Xerox prior to 1998, after having previously received a distribution of pension benefits. The Second Circuit has addressed this issue more than once, and Xerox may not continue to utilize this rejected formula.

The Second Circuit also rejected Xerox's contention

that a procedure utilizing a phantom account has always been a part of the Plan, even prior to 1998. *433 F.3d at 256.* The Circuit determined that Xerox's use of the phantom account constituted a retroactive diminution of benefits, contrary to the law. *Id. at 268.* Furthermore, the Court of Appeals rejected Xerox's contention that it had properly amended the Plan and notified the Plan's participants concerning utilization of the phantom account, prior to 1998. *Id. at 263.*

Although the Circuit clearly [**9] precluded use of the phantom account in determining how to treat prior distributions, it did little to elucidate what formula *should* be adopted, except to suggest using an "appropriate pre-amendment calculation" guided by equitable principles in determining the appropriate remedy for affected employees. *Id. at 268.*

The problem is that if one removes the phantom account mechanism, there is little else remaining. The Circuit expressly recognized this by noting the "difficulty" confronting the district court "because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated." *Id. at 268.*

Describing the procedures to be utilized prior to the 1998 amendments as "ambiguous" is generous. In fact, virtually nothing is set forth in either the Plan or the SPD as to the precise mechanism for taking into account a prior distribution in calculating an employee's present benefits after a rehire.

Some testimony at the hearing before me focused on the appropriate economic, financial and actuarial methods for treating prior distributions. But this Court is not charged with writing a sound retirement [**10] plan. Rather, I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions. If the employee had no notice of the "phantom account," he also had no notice of some of the other mechanisms suggested by witnesses at the

remand hearing before me. What is "best" from a financial or actuarial point of view is not what the Court has been charged with determining. The Court's task, as directed by the Court of Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due this group of rehired employees.

To the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees, who should suffer. *See Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 113 (2d Cir. 2003)* ("The consequences of an inaccurate SPD must be placed on the employer"). It was defendants' obligation to provide a clear description, in the SPD and in the Plan itself, as to how those prior distributions would be treated. To the extent that the Plan was constituted, at Xerox's doing, [**11] to consider all prior years of service, defendants had the burden of elucidating precisely how that would be accomplished.

As noted by the Court of Appeals in this case, *433 F.3d at 258*, the Plan does have a provision, § 9.6, dealing with "nonduplication of benefits." That section provides as follows:

> *Nonduplication of Benefits.* In the event any part of or all of a Member's [*458] accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such Member at any time thereafter recommences active participation in the Plan, the accrued benefit of such Member based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

"Accrued benefit," as used in § 9.6, is defined at § 1.1

as follows:

> The normal retirement benefit which a Member has earned up to any date, and which is payable at Normal Retirement Date in an amount computed in accordance with Section ... 4.3 [which sets forth the general method for calculating the normal retirement benefit], based, however, only upon Average Monthly Compensation [**12] received and Years of Participation rendered by a Member up to the date as of which the Accrued Benefit is computed ... .

As the Court of Appeals noted, there was no description whatsoever as to the mechanics of this so-called phantom account. *433 F.3d at 258.* For that reason, the Second Circuit and other courts rejected the administrator's utilization of such a mechanism in calculating benefits.

The SPD provides even less guidance than the Plan in this regard. As the Court of Appeals noted, the only notice in the SPD concerning non-duplication of benefits was the proviso that "the amount you receive may also be reduced if you had previously left the company and received a distribution at that time." *Id. at 265* (citing *Layaou, 238 F.3d at 210*). The Court of Appeals in both *Frommert* and *Layaou* determined that this bare-bones notice failed to adequately apprise employees as to the phantom account mechanism.

In addition, as those and other cases make clear, where the Plan and the SPD conflict, the SPD controls. *See Burke, 336 F.3d at 110; Frommert, 433 F.3d at 265. Accord Tocker v. Philip Morris Companies, Inc., 470 F.3d 481, 487-88 (2d Cir. 2006);* [**13] *Demirovic v. Building Service 32 B-J Pension Fund, 467 F.3d 208, 210 n. 1 (2d Cir. 2006); Bouboulis v. Transport Workers Union of America, 442 F.3d 55, 61 (2d Cir. 2006).*

The question, then, is what, in light of these vague provisions in the Plan and SPD, this Court should to do to remedy the violation of ERISA. I believe that the best course is to do what I did previously in *Layaou* involving a similar remand from the Court of Appeals. *Layaou v. Xerox Corporation, 330 F.Supp.2d 297 (W.D.N.Y. 2004).* In *Layaou,* I directed the administrator "to recalculate plaintiff's retirement benefit, ... and to pay plaintiff a lump sum in the amount of the difference between the amount of benefits that plaintiff has received, and the amount of the recalculated benefit, without any consideration of a 'phantom account.'" *Id. at 305* (footnote omitted). I added that "[i]t would not be unreasonable ... for the administrator to subtract out the amount of the prior distribution," in order to avoid giving the plaintiff a windfall, but left it to the Plan administrator to perform the actual calculation of the plaintiff's benefits [**14] in the first instance, stating that "[i]f plaintiff believes that the administrator's calculation is erroneous, and the matter cannot be resolved between the parties, he can seek further relief in this Court." *Id. at 304.*

The same process should apply here. This process is straightforward; it adequately prevents employees from receiving a windfall, and I believe it most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD. [*459] Again, if there is some doubt or ambiguity as to this formula, it must be resolved in favor of the employee. *See Lifson v. INA Life Ins. Co. of New York, 333 F.3d 349, 353 (2d Cir. 2003)* (in reading an ERISA plan, "[w]e construe ambiguities against the drafter and in favor of the beneficiary"); *Perreca v. Gluck, 295 F.3d 215, 223 (2d Cir. 2002)* ("absent evidence indicating the intention of the parties, any ambiguity in the language used in an ERISA plan should be construed against the interests of the party that drafted the language").

In so ruling, I also reject defendants' suggestion that the phantom account offset can properly be applied [**15] to *all* employees' accrued benefits earned *after* 1998, regardless of when the employees were rehired. As defendants themselves note, the Second Circuit's statement that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD," *433 F.3d at 263*, "does not expressly contain this limitation," Defendant's Pre-Hearing Brief Addressed to Remedies, Dkt. # 121-1 at 23, and I decline defendants' invitation to infer such a limitation from that apparently categorical statement. The Court of Appeals gave this Court specific directives on remand, and determining whether the phantom account offset should apply to post-1998 earned benefits of employees rehired prior to that date was not among those directives.

II. Which of the Plaintiffs Were Rehired by Xerox after the Plan Was Amended in 1998

The Court of Appeals also directed the district court "to determine which of the plaintiffs were rehired by Xerox after the Plan was amended to include the phantom account and thus can be bound by its terms." *433 F.3d at 269*. This directive relates to the Second Circuit's holding that "for employees rehired subsequent to [**16] the amendment of the Plan through the 1998 SPD, the phantom account is a component of the Plan that they joined and thus may permissibly be applied to them." *Id. at 263*. As the court explained,

> [e]mployees hired after this amendment to the Plan occurred, unlike those rehired before then, became Plan participants under the terms of the amended Plan. As such, the phantom account may permissibly be applied to them. With full notice of the phantom account's existence, these rehired employees, unlike their predecessors who

> lacked such information, had the opportunity to make an informed decision about taking or leaving the terms of the deal offered to them under the Plan.

Id. at 269. That matter does not appear to be in dispute, however, and I presume that the parties will be able to agree on whether each employee was rehired prior to or after the 1998 amendment date. If the parties are unable to agree about whether a particular employee was rehired prior to that, they may seek a determination of that question from the Court.

III. Effect of the Releases Signed by Twenty-Two Plaintiffs

On January 5, 2001, plaintiffs' counsel [**17] filed a motion for "emergent injunctive relief," seeking relief in connection with Xerox's offer to plaintiffs to accept the termination of their employment as part of a reduction in force ("RIF"), and to sign a general release waiving any existing or potential claims they might have had against Xerox--including ERISA claims--in exchange for salary continuance, a form of severance benefit in which the employee would continue to receive his full, regular salary for a specified period even after he stopped working at Xerox.

In his affidavit in support of that motion, plaintiffs' attorney, Robert H. Jaffe, Esq., [*460] characterized Xerox's offer as a form of discrimination against his clients based on their exercise of their rights under ERISA by filing or joining this lawsuit challenging defendants' use of the phantom account offset. Dkt. # 47 P 2.

In his affidavit, Jaffe noted that the proposed release "includes a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." *Id.* P 5. He added that "[t]he form of general release

which Xerox has asked at least five clients [**18] of my law office to execute explicitly includes a release of all claims under ERISA." *Id.* P 8.

Jaffe stated that as of the date of the affidavit, five of his clients, three of whom were then named plaintiffs in this action, had asked him to review the proposed release "and suggest an alternative which would avoid a waiver of their rights under ERISA," at least until the Second Circuit issued a decision in *Layaou,* which was then pending before the Court of Appeals.[1] *Id.* P 9. Jaffe stated that he had drafted a revised release containing language "which carves out from its scope the waiver of pending ERISA claims for recalculation of retirement benefits." *Id.* P 10. Jaffe said that his clients had presented the revised release to Xerox, but were told by Xerox that "it was unacceptable." *Id.*

After hearing oral argument, [**19] this Court denied plaintiffs' motion in open court on January 11, stating in effect that I saw no ERISA violation in an employer's conditioning an offer of severance benefits on a release of ERISA claims. *See* Dkt. # 53 at 38-42.

Twenty-two of the 104 named plaintiffs did subsequently sign the releases and were terminated in a RIF in exchange for salary continuance. Dkt. # 133-7. Although the exact language used varies somewhat among the releases, in general they state that the employee "release[s] Xerox from any and all claims, even if [the employee] d[oes]n't know about the claim at this time, based on anything that has occurred prior to the date [the employee] sign[s] this Release." [2] The

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[1] The Second Circuit's decision remanding *Layaou* was issued about two weeks after plaintiffs filed their motion, on January 18, 2001.

[2] "Xerox" is defined by the releases to include, *inter alia,* "the Xerox employee benefit plans" in

releases expressly referenced a number of types of claims covered by the release, including ERISA claims. With certain exceptions not relevant here, the releases also provided that the employee agreed not to "file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before [the employee] signed this Release." *Id.*

[**20] Each release also states that the employee "acknowledge[s] and agree[s] that the consideration set forth in this Release is in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." *Id.* Four of the releases, however, contain additional language carving out an exception for plaintiffs' claims in this action: "I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy, including my right to a pension under the Xerox Retirement Income Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit." *Id.* at 49, 57, 69, 88.

Plaintiffs now contend that the execution of these releases, even the ones without a [*461] specific exclusion for the claims in this lawsuit, does not bar any of them from pursuing their ERISA claims in this action. Plaintiffs contend that the releases are ambiguous in certain respects, and therefore unenforceable.

As a preliminary matter, I note that plan participants can waive ERISA claims, and that such waivers will be enforced as long as they are knowing and voluntary. *See, e.g., Laniok v. Advisory Committee of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360,*

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which the employee was a participant, as well as the trustees and administrators of those plans. Dkt. # 133-7.

1367 (2d Cir. 1991) [**21] ("the age discrimination provision of ERISA does not prohibit an individual waiver of pension plan participation by an older employee, ... so long as the waiver is knowing and voluntary"); *Mange v. Petrolite Corp., 960 F.Supp. 206, 209 (E.D.Mo. 1997)* ("Under ERISA, a release of claims by plan participants is valid so long as it is knowing and voluntary"). There is also authority that "[a] settlement agreement that releases legal claims in exchange for severance benefits may be enforced under ERISA." *Seman v. FMC Corp. Ret. Plan, 334 F.3d 728, 731-32 (8th Cir. 2003); see also Smart v. Gillette Co. Long-Term Disability Plan, 887 F.Supp. 383, 386 (D.Mass. 1995)* (employee knowingly, intentionally, and voluntarily agreed to a severance plan that included a general release which precluded her ERISA claim), *aff'd, 70 F.3d 173, (1st Cir. 1995).*

The Second Circuit has cautioned, however, that "[t]he validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her waiver of general contract claims." *Finz v. Schlesinger, 957 F.2d 78, 81 (2d Cir. 1992), cert. denied, 506 U.S. 822, 113 S. Ct. 72, 121 L. Ed. 2d 38 (1992);* [**22] *accord Sharkey v. Ultramar Energy Ltd., 70 F.3d 226, 231 (2d Cir. 1995).* Courts should look to the "totality of circumstances" to determine whether a release is knowing and voluntary. *Sharkey v. Ultramar Energy Ltd., Lasmo plc, Lasmo (AUL Ltd.), 70 F.3d 226, 231 (2d Cir. 1995).*

The relevant factors to consider in this analysis include: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms of the release; (4) the clarity of the release; (5) whether the plaintiff was represented by or consulted an attorney; (6) whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law; (7) whether the employer encouraged the employee to

consult an attorney; and (8) whether the employee had a fair opportunity to do so. *Bormann v. AT & T Communications, Inc., 875 F.2d 399, 402-03 (2d Cir.), cert. denied, 493 U.S. 924, 110 S. Ct. 292, 107 L. Ed. 2d 272 (1989).* These factors are not exhaustive, and all [**23] need not be satisfied before a release is deemed enforceable. *Id.*

Here, some of these factors, such as the time (45 days) that plaintiffs had to consider whether to sign the release, and Xerox's encouragement to them to consult an attorney before signing, weigh in favor of enforcement of the releases. Other factors, however, are more troubling, particularly the clarity of the release and the consideration given by Xerox in exchange for the releases.

Paragraphs 3 and 4 of the releases generally provide that the employee releases Xerox from any and all employment-related claims. [3] Paragraph 3 states that the [*462] employee "release[s] Xerox from "any and all claims ... based on anything that has occurred prior to the date" on which the employee signed the release, and paragraph 4 states that the employee "also release[s] Xerox from claims based on [any federal, state or local law] concerning employment ... ." Paragraph 3 lists ERISA claims as one of the types of claims waived by the employee. Read literally, this could be construed to mean that the employee was waiving *any* claim under ERISA, based on anything that occurred prior to the date on which he signed the release. [**24]

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[3] These numbers refer to Xerox's standard release form for participation in a voluntary RIF. *See, e.g.,* Dkt. # 133-7 at 47. The numbering varies somewhat among the releases signed by plaintiffs (some of whom were terminated in involuntary RIFs), though the provisions are essentially the same.

As stated, paragraph 5 states that the consideration set forth in the release, *i.e.,* Xerox's agreement to provide the employee with salary continuance, is "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." This provision was presumably included in the release in order to conform to the requirements of the Older Workers Benefit Protection Act ("OWBPA"), which was enacted by Congress to modify the Age Discrimination in Employment Act ("ADEA") in certain respects, *see Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134, 150 (2d Cir. 2006).*

The OWBPA provides in part that "[a]n individual may not waive any right or claim under [the ADEA] unless [**25] the waiver is knowing and voluntary," and that in general "a waiver may not be considered knowing and voluntary unless at a minimum" certain conditions are met, one of which is that "the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled ... ." *29 U.S.C. § 626(f).*

The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy. This suggests that the employee was *not* waiving his right to such benefits. If he were, it would make little sense to describe his salary continuance as being "in addition to" such benefits.

Read that way, the releases would not bar plaintiffs' claims here. If plaintiffs were entitled to pension benefits under the law, *i.e.,* ERISA, or under Xerox's own policies, they did not waive their rights to such benefits. Furthermore, while it might be argued that there is a distinction between a right to pension benefits in general and a "claim" seeking to have those benefits calculated according [**26] to a particular formula, that is a distinction without a difference here,

because the Second Circuit has now held that, at least with respect to employees rehired before 1998, Xerox's "reduction of justified expectations of benefits [by using the phantom account] took the form of a retroactive cut-back in violation of" ERISA. [4] *433 F.3d at 268.* In other words, those employees were "entitled by law" not simply to receive *some* pension benefits, but to have their benefits calculated without any reduction attributable to a "phantom" account.

Even if some other interpretations of the releases might be plausible, the releases are at the very least ambiguous as to what the employee was giving up in exchange for salary continuance. Section 5 may have been added primarily to comply with the OWBPA, but it cannot [**27] be ignored, and when read in conjunction with paragraphs 3 and 4, it appears to create some [*463] doubt about whether the release truly covered all ERISA claims, especially the proper calculation of benefits to which the employee was entitled. [5]

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[4] ERISA's anti-cutback rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." *29 U.S.C. § 1054(g)(1).*

[5] I recognize that there is authority that noncompliance with the OWBPA does not automatically invalidate a release as to non-ADEA claims. *See Chaplin v. Nationscredit Corp., 307 F.3d 368, 375 (5th Cir. 2002); Kaminski v. CoreStates Fin. Corp., No. CIV. A. 98-CV-1623, 1998 U.S. Dist. LEXIS 18579, 1998 WL 800536, at *3 (E.D.Pa. Nov. 18, 1998).* That does not make such noncompliance irrelevant, however. The requirements of the OWBPA were intended by Congress to ensure that an employee's waiver of his rights be "knowing and voluntary." *29 U.S.C. § 626(f)(1).* Thus, an employer's tendering of consideration that does not

[**28] I recognize that these releases were signed during this litigation, and that in plaintiffs' January 5, 2001 motion for injunctive relief, plaintiffs' own counsel expressed his concern that the releases would constitute "a waiver or withdrawal of any claims that were made or could have been made by [plaintiffs] for recalculation of retirement benefits under ERISA." Certainly these facts could suggest that at least some of the parties understood the releases to cover their claims in this lawsuit. That does not alter the fact, though, that by its terms, the release appears to except from the scope of the waiver any benefits to which the employee is legally entitled. Under Xerox's interpretation, the Plan administrator could refuse to pay an employee *any* pension and, by dint of the release, the employee could do nothing about it. Again, any ambiguity on that score should be resolved against Xerox, which drafted the releases. *Lifson, 333 F.3d at 353; see also Albany Savings Bank, FSB v. Halpin, 117 F.3d 669, 674 (2d Cir. 1997)* ("ambiguities in contracts should be construed against the drafter").

Furthermore, if it had been the parties' mutual understanding [**29] that the releases covered all of plaintiffs' claims in this litigation, it would have been a simple enough matter for Xerox to have included language to that effect in the releases. *See, e.g., Morais v. Central Bev. Corp. Union Employees' Supplemental Ret. Plan, 167 F.3d 709, 711 (1st Cir. 1999)* (enforcing settlement agreement and release that expressly stated that plaintiff had directed his union to withdraw his grievance and demand for arbitration over disputed benefits). A single sentence would have clarified the matter. That some of the *plaintiffs* added language to their releases making clear that the

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exceed the value of anything to which the employee was already entitled is some evidence that the employee's waiver executed in exchange for that consideration was not knowing and voluntary.

releases did not cover their claims in this action demonstrates how easy it would have been for Xerox to insert language in the other releases to include the employees' claims in this particular case, which was already in litigation. [6]

[**30] The omission of any mention of this lawsuit is, in one sense, not surprising, though it is still worth noting. On their face, these releases (other than the ones to which some plaintiffs inserted language expressly excepting their claims in this case from the scope of the release) do not appear to have anything to do with this litigation. Rather, they appear to be standard release forms given to all employees who choose to participate in a RIF, and are aimed at foreclosing the possibility of [*464] the employee's later assertion of claims relating to his termination in the RIF. In an effort to make them comprehensive, the release form lists an array of statutes, including ERISA, that it is intended to cover, but otherwise there is no suggestion that plaintiffs' claims in this case, or any other particular claims, were being waived. On the contrary, the reference to the stated consideration being "in addition to anything of value to which [the employee is] entitled by law or Xerox policy" suggests that the employee did *not* waive any then-pending claims alleging an entitlement to some particular benefits.

Another factor that the Second Circuit has directed

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[6] One could argue, of course, that the language added by several plaintiffs excluding their claims in *Frommert* suggests that the other releases *did* cover those claims. That some plaintiffs chose to insert language clarifying what they understood to be the scope of the release, however, sheds little light on the meaning of the other plaintiffs' releases, which remain, at best, ambiguous on that score.

courts to consider in deciding [**31] whether a waiver is enforceable is whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law. *Bormann, 875 F.2d at 403.* In the case at bar, it appears that, at least with respect to some of the plaintiffs, the consideration received by the plaintiffs, *i.e.,* salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset. In the case of plaintiff Pietrowski, for example, it appears that his prior lump-sum payment at the time of his first separation, plus his severance pay at the time of his second separation, totaled about $ 210,000, but that he would have received over $ 832,000 as a lump-sum payment of his standard Plan annuity. *See* Dkt. # 130-2 Ex. D.

Defendants do not appear to dispute that the plaintiffs in question received less than they would have without the phantom account offset; they simply contend that the consideration received was substantial, and that in any event, the disparity is not as great as plaintiffs contend because defendants' proposed remedial approach would still result in a lesser benefit [**32] than what plaintiffs seek. Of course, I have rejected that remedial approach.

The consideration received by plaintiffs here--in some cases up to a year's salary--was not insignificant. In light of the Second Circuit decision, however, it cannot be said that these benefits exceeded what plaintiffs were entitled to by law, *i.e.,* pension benefits calculated without a phantom account offset. While it is true that plaintiffs did not know, at the time that they signed the releases, what the ultimate result of this litigation would be, both they and Xerox knew that plaintiffs were pursuing ERISA claims for amounts far greater than what Xerox was offering

them in exchange for signing the releases. [7] This at least casts some additional doubt on whether the releases were entered into knowingly and voluntarily with respect to plaintiffs' ERISA claims. *See Unum Life Ins. Co. of America v. Cappello, 278 F.Supp.2d 228, 236 (D.R.I. 2003)* (value of consideration that plan participant received, though "not an insubstantial sum," did not match what issuer of plan contended she waived by entering into severance agreement, since it was likely that amount of benefits to which she [**33] would have been entitled would have been substantial).

I also note that paragraph 3 only releases Xerox from claims "based on anything that ha[d] occurred prior to the date" on which the release was signed. Arguably, that language did not cover plaintiffs' later [*465] receipt of benefits, in amounts less than that to which they claim they are entitled, due to the use of the phantom account offset. At the time the releases were signed, plaintiffs had not yet left Xerox's employ, and had only received projections of [**34] what their benefits would be. Again, that is not the only reasonably interpretation; one could also argue that in light of the existence of this lawsuit challenging that very offset, everyone involved understood the releases to cover any claims concerning the offset. But this nonetheless adds to the ambiguity of the scope of the release, which should not be resolved against

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[7] It appears that one plaintiff, Matthew Alfieri, signed his release on October 27, 2006, after the Second Circuit decision was issued. Dkt. # 133-7 at 46. I see no reason for this Court to rule any differently as to Alfieri, however. If anything, the Second Circuit decision had by that point made it even clearer that Alfieri, like the other plaintiffs, was entitled to calculation of his pension benefit without the phantom account offset, and therefore that he was not waiving his claim in that regard.

plaintiffs.

IV. Breach of Fiduciary Duty

In its decision in this case, the Court of Appeals concluded that there was a triable issue of fact as to "whether the defendants had fiduciary obligations under ERISA and if so whether they breached them ... ." *433 F.3d at 271.* The court stated that

> [o]n remand, the district court should permit a trier of fact to assess (1) whether the defendants acted in a fiduciary capacity when they communicated with the Plan's beneficiaries about the implementation of the phantom account, and (2) whether those communications contained affirmative misrepresentations of fact concerning the Plan or breached the defendants' duty to deal fairly with the Plan's beneficiaries.

Id. at 271-72. The court also "direct[ed] the district [**35] court that if the plaintiffs prevail on this claim, it must determine what 'appropriate equitable relief' is necessary." *Id. at 272.*

Although it might appear difficult to reconcile this directive with the Court of Appeals' holding that "[b]ecause adequate relief is available under [§ 502(a)(1)(B), which allows a plan participant 'to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan'], there is no need on the facts of this case to also allow equitable relief under § 502(a)(3)," *433 F.3d at 270,* I find it unnecessary to resolve any apparent contradiction in that regard, since plaintiffs do not appear to seek any equitable relief on remand, other than relief which either this Court has effectively granted, or which the Second Circuit has already found

to be unwarranted.

Plaintiffs do contend that the Court should rule that the Second Circuit's decision in this case is "class-based," and that it "encompasses all rehired Xerox employee rehired prior to the publication of the September 1998 SPD," Dkt. # 129-1, but to the extent [**36] that plaintiffs seek some sort of declaratory or injunctive relief in that regard, the Second Circuit has held that this is not a proper case for such relief. As stated, the Court of Appeals held that "the necessary remedies can be fully provided under § 502(a)(1)(B)," *433 F.3d at 269*, and concluded that "sweeping relief" in the form of a judgment declaring that the phantom account is prohibited by ERISA and enjoining its application in calculating the benefits of any Plan participants was "not warranted," *id.* [8]

Having said that, the rulings contained both in the Second Circuit decision and in this Decision and Order *do* seem applicable to all Xerox employees who are similarly situated to the named plaintiffs. Leaving aside any particularized [**37] defenses [*466] that the Plan might have against individual employees, I do not see how defendants could continue to utilize the phantom account as to such employees without running afoul of the Second Circuit's holding that "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD." *433 F.3d at 263*. The clear import of the Second Circuit's decision is that utilization of the phantom account with respect to employees rehired before the 1998 Plan amendment violates ERISA. But neither this Court, nor apparently the Second Circuit, sees any basis for granting equitable relief in that regard at this time.

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[8] If plaintiffs' use of the term "class-based" is meant to imply that the Court should grant some "class"-wide relief, that request is also denied. This is not a class action, nor have plaintiffs ever presented it as, or sought to make it a class action.

I also note that the purported basis for plaintiffs' claim for breach of fiduciary duty appears to have shifted somewhat over the course of this litigation. Originally, plaintiffs alleged that "defendants breached their fiduciary duty to Plan participants by publishing and supplying misleading information in SPDs, annual Personal Benefits Statements and in response to the plaintiffs' requests for clarification of their rights under the Plan." *433 F.3d at 270.* On remand, however, this claim seems to focus largely if not entirely [**38] on the releases signed by some of the plaintiffs. Specifically, plaintiffs now contend that defendants breached their fiduciary obligation to disclose to those Plan participants who signed the release "that implementation of the phantom account offset violates *ERISA § 204(g)* and *ERISA § 204(h)* and further that the consideration paid for executing the release was substantially less than the retirement benefits to which they may be entitled to receive [sic] if the phantom account offset was not applied." Dkt. # 129-1 at 15.

In any event, the relief that plaintiffs now seek is simply a ruling by this Court that the releases are unenforceable against plaintiffs insofar as it purports to waive claims for "enhanced" retirement benefits, *i.e.,* benefits calculated without using the phantom account offset. *See id.* at 19. That is essentially what the Court has done. Plaintiffs are getting all of the relief, equitable or otherwise, to which they are entitled. There is no need, therefore, to rule on plaintiffs' claim for breach of fidudiary duty.

V. Plaintiff Holland

Plaintiff Lawrence R. Holland has at all relevant times been an hourly (*i.e.,* non-salaried) Xerox employee [**39] who is covered by the terms of a collective bargaining agreement. Defendants contend that as such, Holland has never been a participant in the Plan, which by its terms excludes from its coverage

"[a]ny person covered by a collective bargaining agreement, the terms of which do not require coverage under this Plan ... ." Dkt. # 121-5 at 6. Therefore, defendants contend, Holland lacks standing to sue for benefits under the Plan.

In response, plaintiffs do not appear to deny that Holland is a participant in a different pension plan from the one at issue in this case, but contend that the plan in which he is a participant utilizes the same phantom account offset as the Plan covering the other plaintiffs. The essence of plaintiffs' argument seems to be that the Court should simply allow Holland's claims to go forward in this case so that hourly Xerox workers will be able to benefit from the Second Circuit's rulings in this case and the relief ordered by this Court with respect to the other named plaintiffs.

Holland's request must be denied. It is axiomatic that only plan participants and beneficiaries may sue for benefits under § 1132(a)(1)(B). *See Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100-01 (2d Cir. 2005)* [**40] (citing *Franchise Tax Board v.* [*467] *Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)).* Holland's suggestion that the Court allow the administrators of his plan to be joined as defendants in this action is denied, as plaintiff has shown no basis for adding additional defendants in this case at this late date. Plaintiffs' contention that defendants have only recently raised the argument that Holland is not entitled to any benefits under the Plan is contradicted by this Court's July 30, 2004 Decision and Order, in which I expressly referenced (but found it unnecessary to decide) defendants' arguments to that effect, *328 F.Supp.2d at 439 n. 14.* Furthermore, plaintiffs have made no motion to amend the complaint to add additional defendants, and plaintiffs' memoranda and other papers on remand are not a proper vehicle for

making such a request. [9]

[**41] **VI. Plaintiffs' Motion to Amend the Complaint**

On November 6, 2006, plaintiffs filed a motion for leave to file a second amended and consolidated complaint, adding a number of additional plaintiffs in this case. The gist of the motion was that following the remand from the Second Circuit, additional Xerox employees who had been separated from and then rehired by Xerox prior to 1998 contacted plaintiffs' counsel, seeking to join in or obtain the benefits of this lawsuit. Plaintiffs' counsel wrote to the Plan administrator, essentially asking him to waive these individuals' exhaustion requirements under ERISA and apply the rulings of this Court and the Court of Appeals in this case and in *Layaou* to these additional Plan participants. Dkt. # 132-3 at 1-4. The administrator's response was, essentially, that until a "final resolution" of this action, the phantom account offset would continue to be applied to all Plan participants, with "no exception or deviation." *Id.* at 5.

To the extent that any of the proposed new plaintiffs have not yet retired from Xerox, I see no basis for adding them to this lawsuit. As stated earlier, the Second Circuit's holding that "the phantom [**42] account may not be applied to employees rehired prior to the issuance of the 1998 SPD," *433 F.3d at 263*, would certainly seem to foreclose defendants from utilizing the phantom account in calculating "new" retirees' pension benefits.

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[9] It would seem to be beyond dispute, though, that use of a "phantom account" in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by *any* plan. It is presumed that no plan administrator would knowingly violate ERISA.

At this point, however, this motion has not been briefed by defendants, and since there may be issues involving individualized defenses or other matters bearing upon the motion to amend, I will not decide the motion at this time, but will instead reserve decision after the matter has been fully briefed, as set forth in the Conclusion of this Decision and Order.

CONCLUSION

Plaintiffs' motion for a determination of the decision of the Second Circuit Court of Appeals and for other further relief (Dkt. # 129) is granted in part and denied in part, and defendants' cross-motion for partial summary judgment (Dkt. # 133) is granted in part and denied in part. Defendants are hereby directed to recalculate plaintiffs' retirement benefits, consistent with the terms of this Decision and Order and the January 6, 2006 decision of the Court of Appeals for the Second Circuit, and to pay each plaintiff a lump sum in the amount of the difference between [**43] the amount of benefits that each plaintiff has [*468] received, and the amount of the recalculated benefit, without any consideration of a "phantom account." Plaintiffs' claim for breach of fiduciary duty is denied as moot. Plaintiff Lawrence Holland's claims are dismissed in their entirety.

Defendants are directed to respond to plaintiffs' motion for an extension of time to file a second consolidated and amended complaint (Dkt. # 132) within thirty (30) days after the date of issuance of this Decision and Order. Plaintiffs shall file reply papers no later than fifteen (15) days after the date that defendants' response is filed.

IT IS SO ORDERED.

DAVID G. LARIMER

United States District Judge

Dated: Rochester, New York

January 24, 2007.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the ____ day of September two thousand and eight,

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Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick,
Janis A. Edelman,
Patricia H. Johnston,
Kenneth P. Parnett,
Joyce D. Cathcart, Floyd Swaim, Julie A. McMillan, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven,

UNITED STATES COURT OF APPEALS
FILED
SEP 25, 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thornton, Charles R. Drannbauer, William M. Burritt, and Janice Ross Heiler,

Plaintiffs-Appellees,

ORDER
No. 07-0418-cv

v.

Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan, and Xerox Corporation, a New York Corporation,

Defendants-Appellants,

XEROX CORPORATION,

Defendant.

Appellees, Paul J. Frommert, Alan H. Clair, Donald S. Foote, et al., having filed a petition for panel

rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: s/
Richard Alcantara, Deputy Clerk

APPENDIX D

MANDATE

WDNY/RONY
00-CV-6311
FELDMAN
LARIMER

United States Court of Appeals
FOR THE
SECOND CIRCUIT

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of July, two thousand eight,

Before: Hon. Chester J. Straub,
Hon. Reena Raggi,
Circuit Judges,
Hon. William K. Sessions, III,
District Judge.*

UNITED STATES COURT OF APPEALS
FILED
JUN 24, 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Docket No. 07-0418-cv

Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J.

Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillan, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Dennis E. Bains, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Carter, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thornton, Charles R. Drannbauer, William M. Burritt, and Janice Ross Heiler,

Plaintiffs-Appellees,

v.

Sally L. Conkright, Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox

Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan, and Xerox Corporation, a New York Corporation,

Defendants-Appellants,

XEROX CORPORATION,

Defendant.

Issued as Mandate:

OCT 22, 2008

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York and was argued by counsel.

ON CONSIDERATION THEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and hereby is AFFIRMED IN PART, VACATED IN PART, and REMANDED for further proceedings in accordance with the opinion of this Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk
by

s/
Joy Pallek
Administrative Attorney

*The Honorable William K. Sessions, III, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk

by s/
DEPUTY CLERK (Seal)

APPENDIX E

29 USC Sec. 626

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The Secretary [Commission] shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (*29 U.S.C. 209* and *211*).

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (*29 U.S.C. 211(b), 216, 217*), and subsection (c) of this section. Any act prohibited under section 4 of this Act [*29 USCS § 623*] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (*29 U.S.C. 215*). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (*29 U.S.C. 216, 217*): *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or

promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary [Commission] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary [Commission]; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary [Commission] to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Secretary [Commission]; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary [Commission]. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [*29 USCS § 633(b)*] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary [Commission] shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice. Section 10 of the Portal-to-Portal Act of 1947 [*29 USCS § 259*] shall apply to actions under this Act. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) [*29 USCS § 630(a)*] against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver.

(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 [*29 USCS § 623* or *633a*] may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any

of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 C.F.R. 1625.22
Waivers of rights and claims under the ADEA.

(a) Introduction. (1) Congress amended the ADEA in 1990 to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f).

(2) Section 7(f)(1) of the ADEA expressly provides that waivers may be valid and enforceable under the ADEA only if the waiver is "knowing and voluntary". Sections 7(f)(1) and 7(f)(2) of the ADEA set out the minimum requirements for determining whether a waiver is knowing and voluntary.

(3) Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.

(4) The rules in this section apply to all waivers of ADEA rights and claims, regardless of whether the

employee is employed in the private or public sector, including employment by the United States Government.

(b) Wording of Waiver Agreements. (1) Section 7(f)(1)(A) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that:

The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

(2) The entire waiver agreement must be in writing.

(3) Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.

(4) The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

(5) Section 7(f)(1)(H) of the ADEA, relating to exit incentive or other employment termination programs offered to a group or class of employees, also contains a requirement that information be conveyed "in writing in a manner calculated to be understood by the average participant." The same standards applicable to the similar language in section 7(f)(1)(A) of the

ADEA apply here as well.

(6) Section 7(f)(1)(B) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that "the waiver specifically refers to rights or claims under this Act." Pursuant to this subsection, the waiver agreement must refer to the Age Discrimination in Employment Act (ADEA) by name in connection with the waiver.

(7) Section 7(f)(1)(E) of the ADEA requires that an individual must be "advised in writing to consult with an attorney prior to executing the agreement."

(c) Waiver of future rights. (1) Section 7(f)(1)(C) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual does not waive rights or claims that may arise after the date the waiver is executed.

(2) The waiver of rights or claims that arise following the execution of a waiver is prohibited. However, section 7(f)(1)(C) of the ADEA does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date.

(d) Consideration. (1) Section 7(f)(1)(D) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * * the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

(2) "Consideration in addition" means anything of

value in addition to that to which the individual is already entitled in the absence of a waiver.

(3) If a benefit or other thing of value was eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute "consideration" for purposes of section 7(f)(1) of the ADEA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case.

(4) An employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40, solely because of that person's membership in the protected class under the ADEA.

(e) Time periods. (1) Section 7(f)(1)(F) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * *

(i) The individual is given a period of at least 21 days within which to consider the agreement; or

(ii) If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

(2) Section 7(f)(1)(G) of the ADEA states:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may

revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

(3) The term "exit incentive or other employment termination program" includes both voluntary and involuntary programs.

(4) The 21 or 45 day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21 or 45 day period; changes made to the final offer that are not material do not restart the running of the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.

(5) The 7 day revocation period cannot be shortened by the parties, by agreement or otherwise.

(6) An employee may sign a release prior to the end of the 21 or 45 day time period, thereby commencing the mandatory 7 day revocation period. This is permissible as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21 or 45 day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. However, if an employee signs a release before the expiration of the 21 or 45 day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

(f) Informational requirements. (1) Introduction. (i) Section 7(f)(1)(H) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . if a waiver is requested in connection with an exit incentive or other

employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) [which provides time periods for employees to consider the waiver] informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(ii) Section 7(f)(1)(H) of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such individuals.

(iii)(A) Section 7(f)(1)(H) of the ADEA references two types of "programs" under which employers seeking waivers must make written disclosures: "exit incentive programs" and "other employment termination programs." Usually an "exit incentive program" is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled (hereinafter in this section, "additional consideration") in exchange for their decision to resign voluntarily and sign a waiver. Usually "other employment termination program" refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.

(B) The question of the existence of a "program" will be

decided based upon the facts and circumstances of each case. A "program" exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

(C) Regardless of the type of program, the scope of the terms "class," "unit," "group," "job classification," and "organizational unit" is determined by examining the "decisional unit" at issue. (See paragraph (f)(3) of this section, "The Decisional Unit.")

(D) A "program" for purposes of the ADEA need not constitute an "employee benefit plan" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). An employer may or may not have an ERISA severance plan in connection with its OWBPA program.

(iv) The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement.

(2) To whom must the information be given. The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement.

(3) The decisional unit. (i)(A) The terms "class," "unit," or "group" in section 7(f)(1)(H)(i) of the ADEA and "job

classification or organizational unit" in section 7(f)(1)(H)(ii) of the ADEA refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure. The terms are not meant to be an exclusive list of characterizations of an employer's organization.

(B) When identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.

(ii)(A) The variety of terms used in section 7(f)(1)(H) of the ADEA demonstrates that employers often use differing terminology to describe their organizational structures. When identifying the population of the decisional unit, the employer acts on a case-by-case basis, and thus the determination of the appropriate class, unit, or group, and job classification or organizational unit for purposes of section 7(f)(1)(H) of the ADEA also must be made on a case-by-case basis.

(B) The examples in paragraph (f)(3)(iii), of this section demonstrate that in appropriate cases some subgroup of a facility's work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise several facilities. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. "Facility" as it is used throughout this section generally refers to place or location. However, in some circumstances terms such as

"school," "plant," or "complex" may be more appropriate.

(C) Often, when utilizing a program an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. If the employer's goal is the reduction of its workforce at a particular facility and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not selected for a program, then that facility generally will be the decisional unit for purposes of section 7(f)(1)(H) of the ADEA.

(D) However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit.

(E) Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

(iii) The following examples are not all-inclusive and are meant only to assist employers and employees in determining the appropriate decisional unit. Involuntary reductions in force typically are structured along one or more of the following lines:

(A) Facility-wide: Ten percent of the employees in the Springfield facility will be terminated within the next ten days;

(B) Division-wide: Fifteen of the employees in the Computer Division will be terminated in December;

(C) Department-wide: One-half of the workers in the Keyboard Department of the Computer Division will be terminated in December;

(D) Reporting: Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;

(E) Job Category: Ten percent of all accountants, wherever the employees are located, will be terminated next week.

(iv) In the examples in paragraph (f)(3)(iii) of this section, the decisional units are, respectively:

(A) The Springfield facility;

(B) The Computer Division;

(C) The Keyboard Department;

(D) All employees reporting to the Vice President for Sales; and

(E) All accountants.

(v) While the particular circumstances of each termination program will determine the decisional unit, the following examples also may assist in determining when the decisional unit is other than the entire facility:

(A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(B) If a company utilizes personnel for a common

function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;

(C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i.e., manufacturing, accounting, human resources), and the program is confined to a distinct function, a smaller decisional unit may be appropriate.

(vi)(A) For purposes of this section, higher level review of termination decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by the Human Resources Department to monitor compliance with discrimination laws does not affect the decisional unit. Similarly, when a regional manager in charge of more than one facility reviews the termination decisions regarding one of those facilities, the review does not alter the decisional unit, which remains the one facility under consideration.

(B) However, if the regional manager in the course of review determines that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

(vii) This regulatory section is limited to the requirements of section 7(f)(1)(H) and is not intended to affect the scope of discovery or of substantive proceedings in the processing of charges of violation of the ADEA or in litigation involving such charges.

(4) Presentation of information. (i) The information

provided must be in writing and must be written in a manner calculated to be understood by the average individual eligible to participate.

(ii) Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as "age 20–30") does not satisfy this requirement.

(iii) In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade level or other subcategory.

(iv) If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

(v) If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

(vi) An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of

the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees so long as the disclosure, at the time it is given, conforms to the requirements of this section.

(vii) The following example demonstrates one way in which the required information could be presented to the employees. (This example is not presented as a prototype notification agreement that automatically will comply with the ADEA. Each information disclosure must be structured based upon the individual case, taking into account the corporate structure, the population of the decisional unit, and the requirements of section 7(f)(1)(H) of the ADEA): Example: Y Corporation lost a major construction contract and determined that it must terminate 10% of the employees in the Construction Division. Y decided to offer all terminees $20,000 in severance pay in exchange for a waiver of all rights. The waiver provides the section 7(f)(1)(H) of the ADEA information as follows:

(A) The decisional unit is the Construction Division.

(B) All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.

(C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office within 45 days after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has 7 days to revoke the waiver agreement.

(D) The following is a listing of the ages and job titles of persons in the Construction Division who were and were not selected for termination and the offer of consideration for signing a waiver:

Job Title	Age	No. Selected	No. not selected
(1) Mechanical Engineers, I	25	21	48
	26	11	73
	63	4	18
	64	3	11
(2) Mechanical Engineers, II	28	3	10
	29	11	17
	Etc., for all ages		
(3) Structural Engineers, I	21	5	8
	Etc., for all ages		
(4) Structural Engineers, II	23	2	4
	Etc., for all ages		
(5) Purchasing Agents	26	10	11
	Etc., for all ages		

(g) Waivers settling charges and lawsuits. (1) Section

7(f)(2) of the ADEA provides that:

A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

(A) Subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) The individual is given a reasonable period of time within which to consider the settlement agreement.

(2) The language in section 7(f)(2) of the ADEA, "discrimination of a kind prohibited under section 4 or 15" refers to allegations of age discrimination of the type prohibited by the ADEA.

(3) The standards set out in paragraph (f) of this section for complying with the provisions of section 7(f)(1) (A)–(E) of the ADEA also will apply for purposes of complying with the provisions of section 7(f)(2)(A) of the ADEA.

(4) The term "reasonable time within which to consider the settlement agreement" means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.

(5) However, while the time periods under section 7(f)(1) of the ADEA do not apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered "reasonable" for purposes of section 7(f)(2)(B) of the ADEA.

(6) A waiver agreement in compliance with this section

that is in settlement of an EEOC charge does not require the participation or supervision of EEOC.

(h) Burden of proof. In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in section 7(f) of the ADEA, subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2) of section 7(f) of the ADEA.

(i) EEOC's enforcement powers. (1) Section 7(f)(4) of the ADEA states:

No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2) No waiver agreement may include any provision prohibiting any individual from:

(i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participating in any investigation or proceeding conducted by EEOC.

(3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

(i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participate in any investigation or proceeding conducted by EEOC.

(j) Effective date of this section. (1) This section is effective July 6, 1998.

(2) This section applies to waivers offered by employers on or after the effective date specified in paragraph (j)(1) of this section.

(3) No inference is to be drawn from this section regarding the validity of waivers offered prior to the effective date.

(k) Statutory authority. The regulations in this section are legislative regulations issued pursuant to section 9 of the ADEA and Title II of OWBPA.

[63 FR 30628, June 5, 1998]

APPENDIX F

XEROX

Name: Ken Pietrowski
Employee # 007103
SSN: _____

Xerox Innovation Group
VOLUNTARY REDUCTION IN FORCE

REQUEST TO PARTICIPATE & GENERAL RELEASE

Request to Participate

1. I hereby request to participate in the Voluntary Reduction in Force Program ("VRIF") as described in the 2005 Xerox Innovation Group Voluntary Reduction in Force Employee Fact Sheet, dated October 24, 2005 (the "Fact Sheet"). My decision to apply is voluntary and I have not been pressured into it. I have carefully reviewed and understand the Fact Sheet, and agree to all its terms and conditions. .I have not relied on any oral representation, promises or agreements of any kind in connection with my decision to apply to participate in the VRIF.

General Release

2. In consideration of Xerox Corporation's ("Xerox") agreement to provide me with salary continuance (per the terms of the VRIF Employee Fact Sheet provided to me) and other valuable consideration, I release Xerox from all the claims described in this Release. For purposes of this Release, "Xerox" includes it employees, directors, officers, agents, stockholders, subsidiaries, affiliates, successors, assigns, and the Xerox employee benefit plans in which I either an now or have been a participant, and the trustees, administrators, successors, agents and assigns of those plans.

3. I release Xerox from any and all claims, even if I don't know about the claim at this time, based on anything that has occurred prior to the date I sign this Release. For example, I release Xerox from any claims based on all laws, such as the following (all laws as currently amended):

Age Discrimination and Employment Act of 1967 (ADEA)	Equal Pay Act of 1963
Older Workers' Benefits Protection Act of 1999 (OWBPA)	Fair Labor Standards Act of 1938
title VII of the Civil Rights Act of 1964	Employee Retirement income Security Act of 1974
Civil Rights Acts of 1866, 1870, 1871 and 1991	Worker Adjustment and Retraining Notification Act of 1989
Americans with Disabilities Act of 1990	Uniformed Services Reemployment Rights Act of 1994
Rehabilitation Act of 1973	Vietnam Era Veteran's Readjustment Assistance Act of 1974
Family and Medical Leave Act of 1993	

4. I also release Xerox from claims based on the laws of the state(s) where I am employed and reside, such as state fair employment practice laws or any other law, whether federal, state or local, concerning employment. I release Xerox from claims based on discrimination in employment such as claims arising out of the offer of employment to me by Xerox, the hiring

of me by Xerox, any employment contract between Xerox and me, any promises made by Xerox regarding future employment, or based on the termination of my employment. Finally, I also release Xerox from claims under state contract or tort law, and from all claims for punitive or compensatory damages, costs or attorney's fees.

5. I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy.

6. I understand and agree that this Release and Xerox's agreement to provide consideration to me should not be construed, in any way, as an admission by Xerox of any wrongdoing or liability to me.

KP

Please initial page 1 here

7. I understand that nothing set forth in this Release limits my right to file, or prevents me from filing, a charge or complaint with the EEOC or any comparable state agency, nor does anything in this Release limit my right to participate in an investigation or proceeding conducted by the EEOC or any comparable state agency.

8. I understand that nothing in this Release limits my right to challenge this Release as not being knowing and voluntary under the ADEA or the OWBPA if I feel this Release does not comply with the requirements of those statutes.

9. Except as provided in paragraphs 7 and 8 above, however, I agree that I will not file or pursue any charge or claim with any governmental agency or any court against Xerox based on anything that occurred before I signed this Release. If I do not comply with my obligations under this paragraph, I shall repay to Xerox upon demand all of the monies paid to me by Xerox as salary continuance in consideration for this Release, and I agree to pay all of Xerox's costs and expenses in defending the claim or action, including Xerox's reasonable attorney's fees.

10. I understand and acknowledge that Xerox policy provides that for a period of one year after the termination of my employment with Xerox, I am not eligible for rehire as an employee, or for retention as a contract worker or consultant.

11. Xerox advises me:

- **TO CONSULT WITH AN ATTORNEY OF MY CHOOSING TO COUNSEL ME AS TO MY RIGHTS BEFORE i SIGN THIS RELEASE;**

- TO TAKE SUFFICIENT TIME TO DECIDE WHETHER TO SIGN THIS RELEASE. I HAVE 45 DAYS FROM THE DATE THIS RELEASE IS PROVIDED TO ME TO CONSIDER IT BEFORE I SIGN AND RETURN IT TO XEROX;
- THAT EVEN AFTER I SIGN AND RETURN THIS RELEASE TO XEROX, I WILL HAVE 7 DAYS THEREAFTER TO CHANGE MY MIND AND REVOKE MY RELEASE BY ASKING XEROX FOR ITS RETURN.

12. I understand and agree that this Release waives all claims I may have at the time I sign it, including claims I do not then know about or suspect. I further understand and acknowledge that California Civil Code, Section 1542 provides: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." I waive any rights I may have under that Code section, if applicable, or any other similar state or federal statute or common law principle of similar effect.

Date Release provided to employee: October 24, 2005

Date signed and returned to Xerox: November 23, 2005

By: s/ Kenneth W. Pietrowski
Employee signature

Kenneth W. Pietrowski
Employee Name (Please print)

007103
Xerox Employee Number

General Release
Revised October 24, 2005

APPENDIX G

The Economic Slowdown's Impact on Middle-Aged and Older Americans
Research Report

Jeffrey Love, Ph.D., AARP Knowledge Management
Gerard Rainville, AARP Knowledge Management

June 2008

AARP commissioned a nationwide survey to determine how people age 45 and older are responding to the current economic slowdown. The survey asked a nationally representative sample of 45+ Americans, including an oversample of Hispanic Americans, for their assessments of the economy's condition, whether they have taken actions in response to the changing economy, and if they felt enough was being done to address economic problems. Results show that a majority of respondents believe the economy is in bad shape and that many have adapted their behaviors in response to the floundering economy.

Survey findings include:

* Eighty-one percent of all respondents, and 86% of Hispanic respondents, say the economy is in fairly bad or very bad condition. A similar percentage feel the economy is getting worse.

* Over one-fourth of all respondents, and 41% of Hispanic respondents, said they are having trouble paying their mortgage or rent and one-third have stopped putting money into their retirement accounts. More than one-fourth of all workers and Hispanic workers ages 45+ have postponed plans to retire.

* As the economy slows and prices rise, most middle-aged and older respondents, including Hispanic respondents, report that they are having difficulty

paying for food, gas, utilities, and medicine, and are responding to the situation by cutting luxuries and postponing major purchases and travel.

* Respondents age 65 and over were less likely than those ages 45-64 to report having taken steps to cope with a slowing economy or increasing prices as a result of the recent economic slowdown. This does not indicate that the older population is better off financially. Rather, the data suggest that the 65 and over group had, even prior to the economic downturn, been forced to adjust their spending habits because of their work status, fixed income, and rising costs.

This study is based on a national telephone survey of 1,002 adults ages 45 and older who were currently working, looking for work, or retired. This sample was then boosted to obtain additional interviews with Hispanics, producing an oversample of 400 Hispanics ages 45 and older. The interviews were conducted in English by Woelfel Research, Inc. from April 12 to April 23, 2008. The results are weighted by age and gender. For additional information about the national survey, contact Jeffrey Love, Director of Strategic Issues Research, at 202-434-6279. For information on the Hispanic survey, contact Gerard Rainville at 202-434-6295.

APPENDIX H
Excerpts from Appellants' Brief

07-0418-cv

United States Court of Appeals

for the

Second Circuit

Paul J. Frommert, Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillan, Dennis E. Baines, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling,

(Caption continued on inside cover.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

NIXON PEABODY, LLP
Attorneys for Defendants-Appellants
Margaret A. Clemens, *of Counsel*
Clinton Square
P.O. Box 31051
Rochester, New York 14603-1051
(585) 263-1000

litigation. *(Id.)* The inclusion of the "any and all claims" language in the release, as well as these facts, demonstrate that those appellees who chose to sign the releases were fully aware that the release language at issue was intended to include appellees' disputed claims to a recalculation of benefits. There was no need to include, as the District Court suggests, a specific reference appellees' agreement to waive their disputed ERISA claim asserted in this case. (SPA-31).[5]

[5] As the District Court pointed out, a few individuals modified the releases to exclude the claims asserted in *"Frommert v. Conkright"*, and they submitted those altered releases in exchange for salary continuance payments. To the extent that the releases are otherwise deemed to be enforceable on this appeal, appellees will withdraw their objections with respect to these few individuals since Xerox, however, inadvertently, accepted the releases with the carve out.

APPENDIX I

XEROX
MEMORANDUM



Protect until Forever

To
Frances Tobin

From
Mary Ann Mannix

Mgr., HR Operations, XNA Program & Communications
XRX2 - 027; 8*223-1168

Subject
VRIF Request

Date
August 08, 2006

This confirms receipt of your August 7, 2006 request to participate in the NAAO Voluntary Reduction in Force program.

We are unable to accept your application with the change you added to the bottom of page 2 of the Request to Participate and General Release. If you choose, you may resubmit your request without this change prior to the close of the application window at 5:00 p.m. Central time on Thursday, August 24, 2006.

<Original signed by Mary Ann Mannix>

Copy:
F. Tobin File
R. Vescovacci
VRIF Coordinator

APPENDIX J

XEROX

Xerox Retirement Income Guarantee Plan Pension Calculation Statement

Statement Date 01-31-2006

000013
Kenneth W. Pietrowski
28 Pine Brooke Circle
Penfield NY 14526

Your **estimated** pension benefit was calculated based on the information listed below and your earnings, service, and investment results as of January 30, 2006. Changes in earnings, service, investment performance, pension payment start date, beneficiary designation, or other factors could cause a difference in the actual benefit you receive. Prior distributions due to termination or a Qualified Domestic Relations Order will reduce the benefit payable to you.

Your pension benefit was calculated based on the information listed below. Please review this information carefully.

Your Personal Information

Birth Date	08-26-1942
Original Hire Date	08-12-1963

Your Assumptions

Last Day of Employment	11-30-2006
RIGP Pension Payment Start Date	12-01-2006
Age at RIGP Pension Payment Start Date (in years)	64.333333

Pension • Calculation Statement, Page 2 .

Your Pension Benefit Calculation Components

Vesting Service (in years)	43.000000
Benefit Service (in years)	41.500000
Monthly Final Average Pay	$12,057.79

For more detail on the benefit formulas, refer to your Summary Plan Description, "You and Xerox," as provided by the Xerox Benefits Center.

Benefit Formulas

Your monthly 50% Joint and Survivor Annuity retirement benefit is calculated as the greatest of the following formulas:

• 1.0% times Final Average Pay times Benefit Service

• 1.4% times Final Average Pay times Benefit Service (up to 30 years)

• Cash Balance Retirement Account (CBRA) converted to an annuity

• Transitional Retirement Account (TRA) converted to an annuity

Pension Calculation Statement, Page 3

Benefit Comparison

Benefit Formula	Monthly 50% Joint and Survivor Annuity at Normal Retirement Age	Monthly 50% Joint and Survivor Annuity at Pension Payment Start Date	Lump Sum at Pension Payment Start Date
1.4% Formula Benefit	$5,064.27	$5,064.27	$832,626.09
1.0% Formula Benefit	$5,003.98	$5,003.98	$822,713.69
CBRA Benefit	N/A	$3,173.48	$521,757.67
TRA Benefit	N/A	$4,767.16	$783,776.89

Your benefit is calculated by determining the largest total benefit in the first column above and then subtracting the prior distribution in the second column from that amount. Because the 1.4% or 1.0% Formula Benefit produced the largest total benefit, the prior distribution from the next largest benefit (either from CBRA or TRA) is subtracted to arrive at the amount payable.

Because you received a prior distribution, your monthly pension benefit will be reduced by the present value of the prior distribution. Therefore, your monthly 50% Joint and Survivor Annuity at the pension payment start date is $319.99.

Offset of Prior Distribution

Benefit Formula	Lump Sum at Pension Payment Start Date	Offset of Prior Distribution
1.4% Formula Benefit	$832,626.09	$735,536.65
1.0% Formula Benefit	$822,713.69	$735,536.65
CBRA Benefit	$521,757.67	$373,257.44
TRA Benefit	$783,776.89	$735,536.65

Pension Calculation Statement, Page 4 .

CBRA/TRA Payment Option Information

Following is a list of CBRA/TRA payment options that are available to you based on the assumptions you entered on **January 30, 2006**.

The Single Life Annuity is the automatic payment form if you're single, unless you elect a different payment option. The 50% Joint and Survivor Annuity is the automatic payment form if you're married, unless you elect a different payment option and your spouse consents.

Your actual CBRA or TRA Benefits will be converted to the monthly annuity options listed below based on the interest rate in effect on your pension payment start date. If the interest rate at the time your payment begins is different from the current rate, your monthly annuity options may be higher or lower than the amounts shown below.

Please note that current interest rates have been used for determining the lump sum value of your formula benefits. These interest rates change annually effective January I of each year.

Pension Calculation Statement, Page 5

Your CBRA/TRA Payment Options

Payments as of December 1, 2006	Payable to You	Payable to Your Beneficiary Upon Your Death
LumpSum *This option is a one-time payment.*	$48,240.24	$0.00
Single Life Annuity	$319.99	$0.00
Single Life Annuity with Cash Refund	$294.43	$0.00
50% Joint and Survivor Annuity	$293.41	$146.71
50% Joint and Survivor Annuity with Cash Refund	$292.19	$146.10
50 % Last Survivor Annuity *If your beneficiary dies, your payment/or life will be:*	$316.21 $158.11	$158.11 $0.00
100% Joint and Survivor Annuity	$270.95	$270.95
100% Joint and Survivor Annuity with Cash Refund	$269.96	$269.96

100% Last Survivor Annuity *If your beneficiary dies, your payment/or life will be:*	$270.95 $270.95	$270.95 $0.00
5- Year Certain and Life Annuity *If you die after receiving 5 years of payments, no benefit would be payable to your beneficiary.*	$316.57	$316.57
10- Year Certain and Life Annuity *If you die after receiving 10 years of payments, no benefit would be payable to your beneficiary.*	$307.86	$307.86
15- Year Certain and Life Annuity *If you die after receiving 15 years of payments, no benefit would be payable to your beneficiary.*	$295.61	$295.61

20- Year Certain and Life Annuity *If you die after receiving 20 years of payments, no benefit would be payable to your beneficiary.*	$280.18	$280.18

Pension Calculation Statement, Page 6 .

Excess Benefit Payment Option Information

In addition to the CBRA/TRA Benefit, you are also entitled to receive an Excess Benefit.

Following is a list of Excess Benefit payment options that are available to you based on the assumptions you entered on January 30, 2006.

The Single Life Annuity is the automatic payment form if you're single, unless you elect a different payment option. The 50% Joint and Survivor Annuity is the automatic payment form if you're married, unless you elect a different payment option and your spouse consents.

Pension Calculation Statement, Page 7

Your Excess Benefit Payment Options

Payments as of December 1, 2006	Payable to You	Payable to Your Beneficiary Upon Your Death
Lump Sum *This option is a one-time payment.*	$48,849.20	$0.00
Single Life Annuity	$270.54	$0.00
Single Life Annuity with Cash Refund	$248.94	$0.00
50% Joint and Survivor Annuity	$297.12	$148.56
50% Joint and Survivor Annuity with Cash Refund	$295.89	$147.95
50 % Last Survivor Annuity *If your beneficiary dies, your payment/or life will be:*	$320.21 $160.11	$160.11 $0.00
100% Joint and Survivor Annuity	$274.39	$274.39
100% Joint and Survivor Annuity with Cash Refund	$273.38	$273.38

100% Last Survivor Annuity *If your beneficiary dies, your payment/or life will be:*	$274.39 $274.39	$274.39 $0.00
5- Year Certain and Life Annuity *If you die after receiving 5 years of payments, no benefit would be payable to your beneficiary.*	$267.66	$267.66
10- Year Certain and Life Annuity *If you die after receiving 10 years of payments, no benefit would be payable to your beneficiary.*	$260.28	$260.28
15- Year Certain and Life Annuity *If you die after receiving 15 years of payments, no benefit would be payable to your beneficiary.*	$249.93	$249.93

20- Year Certain and Life Annuity *If you die after receiving 20 years of payments, no benefit would be payable to your beneficiary.*	$236.89	$236.89

Pension Calculation Statement, Page 8

If You're Planning to Start Your Payments Soon

Notify the Xerox Benefits Center

Please notify the Xerox Benefits Center 45 to 90 days before the date you want your pension payments to start.

For More Information

If you need additional information, access the Your Benefits Resources Web site at **http://resources.hewitt.com/xerox** or call the Xerox Benefits Center toll-free at **1-888-979-9961**.
Benefits Center Representatives are available between **9 a.m.** and **6 p.m.**, Eastern time, Monday through Friday. The automated telephone system is available 24 hours a day Monday through Saturday and after **1 p.m.** Eastern time, on Sunday. For TTY, contact your local relay service.

Your Benefits Resources is a trademark of Hewitt Management Company LLC.

Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

NOS. 08-803, 08-826

IN THE

Supreme Court of the United States

PAUL J. FROMMERT, ET AL.,

Petitioners,

v.

SALLY L. CONKRIGHT, ET AL.,

Respondents.

On Petition For A Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION

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Counsel for Respondents

January 2009

QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that Release Petitioners' release of their ERISA claims was enforceable where (1) the Second Circuit recited an undisputedly correct rule of law that takes individual circumstances into account, and (2) applied that rule to an undisputed factual record regarding Release Petitioners' individual circumstances?

2. Whether the Second Circuit correctly applied "federal common law" in applying a well-established legal standard to the unique facts of this case?

3. Whether the Second Circuit correctly held that statutory requirements applicable by their terms only to releases of claims under the Older Workers Benefit Protection Act are inapplicable to ERISA claims?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITIONS 11

I. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "GROUP STANDARD" QUESTION 11

A. The Second Circuit Did Not Adopt A New "Group Standard" For Reviewing Releases Of ERISA Claims. 12

B. Release Petitioners Waived The Argument That Additional Evidence Is Required In Order To Determine The Validity Of Their Releases. 14

C. The Second Circuit Reached The Correct Result In Light Of The Factual Record Before It. 15

II. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "FEDERAL COMMON LAW" QUESTION. 18

III. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "OWBPA" QUESTION.....23

A. The OWBPA Requirements For Releases Do Not Apply To ERISA Claims.....23

B. The Releases At Issue Here Do Not Violate The OWBPA.....26

CONCLUSION.....28

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Auer v. *Robbins*, 519 U.S. 452 (1997) 15

Blackwell v. *Cole Taylor Bank*, 152 F.3d 666 (7th Cir. 1998) 25

Chaplin v. *NationsCredit Corp.*, 307 F.3d 368 (5th Cir. 2002) 21, 23-25

Finz v. *Schlesinger*, 957 F.2d 78 (2d Cir. 1992) ..... *passim*

Houghton v. *South*, 965 F.2d 1532 (9th Cir. 1992) 16

International Shortstop, Inc. v. *Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991) 16

Irby v. *Bittick*, 44 F.3d 949 (11th Cir. 1995) 17

Laniok v. *Advisory Committee of Brainerd Manufacturing. Co. Pension Plan*, 935 F.2d 1360 (2d Cir. 1991) ..... *passim*

Oubre v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998) 23-25

FEDERAL STATUTES AND RULES

29 U.S.C. § 626(f) 9, 23, 26

Fed. R. Civ. P. 56 17

Sup. Ct. R. 10 ..... 20, 22

STATEMENT OF THE CASE

This lawsuit began in 1999, when a number of current and former participants in the Xerox Corporation Retirement Income Guarantee Plan ("Plan") sued the Plan, the Plan Administrators, and Xerox Corporation under the Employee Retirement Income Security Act of 1974 ("ERISA"). During the pendency of the lawsuit, the 18 Release Petitioners executed agreements releasing Respondents from "any and all claims" in exchange for a substantial salary continuance benefit. Two separate sets of Release Petitioners have petitioned this Court arguing that those releases are unenforceable. This Consolidated Brief in Opposition addresses both Petitions.

In the underlying lawsuit, Release Petitioners asserted that a Plan provision that reduced their benefits was not properly added to the Plan. In 2006, the Second Circuit agreed with Release Petitioners that the Plan provision in question was not properly disclosed to Plan participants until 1998. The Second Circuit later held that the 18 Release Petitioners' claims were barred by releases they signed between 2001 and 2006 in connection with their separation from Xerox. The latter holding was correct and, in any event, does not warrant review by this Court.

In the first of the two Petitions, the *Pietrowski* Petitioners argue that the Second Circuit adopted a "group standard" under which the individualized circumstances of employees releasing ERISA claims need not be considered. In fact, the Second Circuit did *not* adopt a "group standard"; rather, it applied

the very totality-of-the-circumstances test that Release Petitioners concede is applicable. That test, both as stated and as applied by the Second Circuit in the decision below, accords with the decisions of other Circuits and *does* take individual circumstances into account. Release Petitioners, moreover, never offered any individualized evidence in opposing Respondents' motion for summary judgment. Nor did they argue in the Second Circuit that a remand for additional factual development might have been required. For these reasons, the *Pietrowski* Petition should be denied.

In the second Petition, the *Frommert* Petitioners make a series of scattershot arguments that the Second Circuit failed to take into account various principles of federal common law in enforcing the releases. The common theme that unites these arguments is the assertion that the Second Circuit misapplied the correct rule of law to the particular facts of this case. Even if Release Petitioners were correct – and they are not – this Court should not review the Second Circuit's application of the correct rule of law to a particular set of facts.

The *Frommert* Petitioners also argue that the Second Circuit erroneously failed to apply certain technical provisions of a statute governing the release of age discrimination claims to their release of their ERISA claims. Decisions of this Court and every Circuit to address the question, however, make clear that the statute does not apply to non-age discrimination claims. Moreover, the releases in question fully complied with the statutory

requirements relied on by Release Petitioners. The *Frommert* Petition therefore should be denied.

1. Each of the Plaintiffs in the underlying lawsuit worked for Xerox for a period of time, left Xerox's employ, and later was rehired by Xerox. (*Frommert* Pet. App. 23a.) When Plaintiffs' initial period of employment with Xerox ended, they received lump sum distributions of benefits from the Plan. (*Id.*) They each resumed earning benefits upon being rehired. (*Id.*) To avoid giving such rehired employees double credit for their initial period of service, the Plan provides that the pension benefits of rehired employees must be reduced, or "offset," by the value of their prior benefit distributions.

This lawsuit arises from a challenge to one of the two Plan provisions governing the calculation of this offset – a provision that the Second Circuit referred to as the "phantom account" offset provision. In 2004, the District Court issued a summary judgment rejecting Plaintiffs' challenge to that provision. In 2006, the Second Circuit reversed the District Court in part, holding that the "phantom account" offset provision was not fully disclosed to Plan participants until 1998. (*Id.* at 6a.) The Second Circuit did not find that the provision was unlawful or substantively unfair; it held only that the provision was not fully disclosed in the manner required by ERISA prior to 1998. It remanded the case to the District Court with instructions to recalculate Plaintiffs' benefits under the Plan without reference to the "phantom account" offset provision. (*Id.*)

On remand, the District Court in 2007 held that the Plan – excised of the provision in question – permits the Plan to offset a rehired employee's benefit only by the *nominal* amount of the employee's prior distribution, without accounting for the time value of money. (*See id.* at 30.) Plaintiffs' own expert recognized that this result conferred a windfall on rehired employees. (A. 484.)[1] The Second Circuit nevertheless affirmed this holding of the District Court in the decision below. (*Frommert* Pet. App. 9a).[2]

2. Over the past decade, Xerox has periodically instituted various voluntary and involuntary "reduction in force" programs. Under these programs, participating employees receive up to 52 weeks of salary continuance upon the signing of a general release ("Release"). (*See id.* at 32a.) The *Frommert* and *Pietrowski* Petitions arise from the fact that 18 individual Plaintiffs signed Releases during the pendency of this action. (*Id.* at 13a-14a n.3.)

The Releases expressly provided that the employees released "Xerox from *any and all claims . . . based on anything that has occurred prior to the date [they] sign[ed] th[e] release.*" (*Id.* at 14a (emphasis added).) The term "Xerox" in the Release

---

[1] References to "(A. __)" are to Appellants' Appendix, submitted below.

[2] That holding is the subject of a separate petition for a writ of certiorari filed by the Plan and its Plan Administrators. (*See* Dkt. No. 08-810.)

is defined to include, among other entities, the "Xerox employee benefit plans" and their administrators. (*Id.* at 33a-34a n.2.)

The Release counseled employees to take sufficient time in deciding whether to sign the Release, gave them 45 days to consider the Release before returning it to Xerox, and gave them another seven days to revoke the Release after signing it. (*Id.* at 82a.) The Release also expressly advised employees to consult with an attorney before signing the Release. (*Id.* at 81a.)

3. In January 2001, counsel for Plaintiffs in this lawsuit filed an "emergency" motion asking the District Court to enjoin Xerox from seeking a release of Plaintiffs' claims. In support of that motion, Plaintiffs' counsel submitted an affidavit stating that he had consulted, among others, with each of the Release Petitioners who was then a party to this action regarding the Release. (*See* A. 49.)

As Plaintiffs' counsel acknowledged in his affidavit, the Releases "explicitly include[d] a release of all claims under ERISA" and, in particular, encompassed Plaintiffs' claims "for recalculation of retirement benefits under ERISA." (*Id.* at 47-48.) For that reason, Plaintiffs' counsel suggested that his clients seek permission from Xerox to "sign a general release which carves out from its scope the waiver of pending ERISA claims for recalculation of retirement benefits." (*Id.* at 49-50.) Specifically, Plaintiffs' counsel suggested adding the following language to the Release: "This release does not intend to and does not release any claim the undersigned has

asserted or will assert for recalculation of retirement benefits" under the Plan. (*Id.* at 67.) According to the affidavit, however, Plaintiffs who brought this revised language to the attention of Xerox were informed that they would not be eligible for salary continuance "unless they execute[d] the general release in the form provided by Xerox." (*Id.* at 50.)

The District Court denied Plaintiffs' "emergency" motion regarding the release issue in January 2001. (*Frommert* Pet. App. 33a.)

4. By 2006, a total of 22 *Frommert* Plaintiffs had signed Releases that were accepted by Xerox. (A. 1047-48.) Four of those individuals had altered the forms provided to them to carve out the *Frommert* lawsuit from the scope of the released claims.[3] Although Xerox's acceptance of the four modified releases was inadvertent, Respondents conceded below that the claims of these four individuals are not barred. (*Frommert* Pet. App. 13a-14a n.3.) Thus, the instant dispute concerns only the Releases signed by the remaining 18 Release Petitioners.

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[3] Those four individuals did so by inserting the italicized language below:

> I acknowledge and agree that the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy, *including any right to a pension under the Xerox Retirement Pension Guarantee Plan to which I do not release my claim as a member of the Frommert lawsuit.*

(*Frommert* Pet. App. 34a.)

In November 2006, Respondents filed a motion for summary judgment seeking to enforce the Releases. (*See* A. 1051.) In support of that motion, Respondents submitted, pursuant to Local Rule 56.1, a Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried ("Rule 56 Statement"). Respondents' Rule 56 Statement, among other things, averred that each of the Plaintiffs was "educated and worked in salaried positions at Xerox for many years" and that each was "represented by counsel" in this lawsuit at "the time the[y] signed the releases." (*Id.* at 1048-49.)

In responding to that motion, Release Petitioners did not submit any additional facts or in any way controvert the facts set forth in Respondents' Rule 56 Statement and supporting affidavits. Indeed, Release Petitioners acknowledged in their brief that "the plan participants who signed general releases had available to them counsel who had been a part of this case since November 1999." (A. 1103.) Release Petitioners argued only that the Releases by their terms were unenforceable in this case.

5. In its 2007 decision, the District Court denied Respondents' motion for summary judgment on the release issue. The District Court recognized that plan participants may knowingly and voluntarily waive ERISA claims. (*Frommert* Pet. App. 34a-35a (citing, *inter alia*, *Laniok* v. *Advisory Committee of Brainerd Manufacturing. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991)).) It further recognized that, in order to determine whether a waiver is knowing and voluntary, courts must consider the

"totality of the circumstances," including but not limited to

> (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms of the release; (4) the clarity of the release; (5) whether the plaintiff was represented by or consulted an attorney; (6) whether the consideration given in exchange for the employee's waiver exceeds benefits to which the employee was already entitled by contract or law; (7) whether the employer encouraged the employee to consult an attorney; and (8) whether the employee had a fair opportunity to do so. [hereinafter, the "*Laniok* factors"]

(*Frommert* Pet. App. 35a-36a.)

The District Court, moreover, acknowledged that a number of the *Laniok* factors, "such as the time (45 days) that plaintiffs had to consider whether to sign the release, and Xerox's encouragement to them to consult an attorney before signing, weigh in favor of enforcement of the releases." (*Id.* at 36a.) However, it held that other factors, "particularly the clarity of the release and the consideration given by Xerox in exchange for the releases," rendered the Releases unenforceable. (*Id.*)

The District Court's holding that the Releases were insufficiently clear was based primarily on

Release language stating that "the consideration set forth in this Release is in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." (*Id.* at 34a.) According to the District Court, this language arguably carved out Release Petitioners' claims from the scope of the Release because the Second Circuit had determined in its 2006 decision that Release Petitioners were "entitled by law" to benefits calculated without reference to the so-called "phantom account" offset provision. (*Id.* at 37a-38a.)

The District Court also held that the "consideration given by Xerox in exchange for the releases" militated against their enforcement. (*Id.* at 36a.) Specifically, the District Court observed that, under the Older Workers Benefit Protection Act ("OWBPA"), an "individual may not waive any right or claim under [the Age Discrimination in Employment Act ("ADEA")] unless the waiver is knowing and voluntary," which for OWBPA purposes requires, among other things, that the "the individual waive[] rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled." (*Id.* at 37a (quoting 29 U.S.C. § 626(f)).) According to the District Court, the Releases were unenforceable in part because "the consideration received by [Release Petitioners], *i.e.*, salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset." (*Id.* at 41a.)

6. In its 2008 decision, the Second Circuit reversed the District Court on the release issue. It began by citing the two leading Second Circuit cases

regarding the waiver of ERISA claims – *Finz* v. *Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992), and *Laniok* v. *Advisory Committee of Brainerd Manufacturing. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991) – for the proposition that "an individual can waive his or her right to participate in a pension plan governed by ERISA only if his or her waiver 'is made knowingly and voluntarily.'" (*Id.* at 15a.) (citations omitted).) It then recited the same non-exhaustive list of *Laniok* factors cited by the District Court. (*Id.* at 16a.) Unlike the District Court, the Second Circuit concluded, after "reviewing the undisputed facts pertaining to these releases under the totality of the circumstances," that Release Petitioners knowingly and voluntarily gave the Releases. (*Id.* at 19a.)

As part of its totality-of-the-circumstances analysis, the Second Circuit concluded that "the explicit and broad language in the release form" – which released Respondents from "any and all claims" arising prior to the giving of the Release – unambiguously covered Release Petitioners' claims. (*Id.* at 14a, 16a.) In so holding, the Second Circuit rejected the District Court's argument that the "entitled by law" language narrowed the scope of the Release. As the Second Circuit explained, that argument "conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." (*Id.* at 17a-18a.)

The Second Circuit also rejected the argument that the Releases were unenforceable because the consideration provided in exchange for them was less than what Release Petitioners otherwise would have

received under the District Court's subsequent benefits calculation. As the Second Circuit explained, "neither the uncertainty of such benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the signing Plaintiffs[] likely expected at that time [they signed the Releases] can render the[] releases unenforceable." (*Id.* at 19a.)

Finally, the Second Circuit considered the District Court's conclusions that "the releases failed to comply with a provision of the [OWBPA] and that such noncompliance has relevance to the determination of whether [Release Petitioners] released Xerox from ERISA-based claims." (*Id.* at 18a n.4.) The Second Circuit declined to examine whether in fact the Releases violated the OWBPA, instead holding that "such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was 'knowing and voluntary.'" (*Id.*)

REASONS FOR DENYING THE PETITIONS

I. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "GROUP STANDARD" QUESTION.

The *Pietrowski* Petitioners (Dkt. No. 08-826) urge this Court to grant the writ because the Second Circuit purportedly adopted a new "group standard" for evaluating the validity of releases under ERISA that "moots inquiry into the particular circumstances attending each individual releasor's execution of the release." (*Pietrowski* Pet. at 15a-16a.) In fact, the Second Circuit did no such thing. Rather, it recited

and applied the very same totality-of-the-circumstances test that the Second Circuit and other courts of appeals have long employed in evaluating the release of ERISA claims. This case accordingly does *not* present a conflict among the Circuits regarding any question of law. Rather, at best, Release Petitioners disagree with the Second Circuit's application of a well-established rule of law to the particular facts of this case. Certiorari is therefore unwarranted.

Release Petitioners, moreover, neither came forward with any individualized facts in opposing Respondents' motion for summary judgment in the District Court nor argued to the Second Circuit that a remand for additional factual development might be required. Accordingly, Release Petitioners waived the argument that a remand was required, and the decision of the Second Circuit, in light of the undisputed factual record before it, was plainly correct. The Petition should be denied for these reasons as well.

A. The Second Circuit Did Not Adopt A New "Group Standard" For Reviewing Releases Of ERISA Claims.

In *Finz* v. *Schlesinger*, 957 F.2d 78 (2d Cir. 1992), the Second Circuit held that "waiver of pension benefits is subject to closer scrutiny than . . . waiver of general contract claims" and therefore "required close inspection of the totality of circumstances surrounding a waiver of ERISA benefits" in order to ensure that the waiver is knowing and voluntary. *Id.*

at 81 (citing *Laniok* v. *Advisory Comm. of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991)). The Second Circuit also observed that the *Laniok* factors, while "not exhaustive," "may be examined" as part of the totality-of-the-circumstances analysis. *Finz*, 957 F.2d at 81.

As the *Frommert* Petitioners acknowledge, "the Second Circuit applied the factors set forth in *Laniok*" in the decision below. (*Frommert* Pet. at 17.) Indeed, contrary to the *Pietrowski* Petitioners' suggestion, the Second Circuit expressly considered not only the language of the Releases, but also the other relevant *Laniok* factors – including, for example, the consideration given to Release Petitioners and the amount of time that Release Petitioners were given to decide whether to sign the Releases. (*Pietrowski* Pet. App. 22a.) Only then did the Second Circuit conclude, after "*reviewing the undisputed facts pertaining to the[] releases under the totality of the circumstances*," that the Releases are enforceable. (*Id.* at 21a (citing *Finz*, 957 F.2d at 82) (emphasis added).)

Unable to find any support for the proposition that the Second Circuit rejected the well-established totality-of-the-circumstances test in favor of a new "group standard," Release Petitioners instead seek to divine the "group standard" from an *amicus* brief offered in support of Respondents. That amicus brief, according to Release Petitioners, urged the Court to adopt a rule under which "form releases affecting large numbers of laid off workers . . . should trump individualized process." (*Pietrowski* Pet. at 16a-17a.) Notably, however, Release Petitioners do not – and

cannot – cite any language in the Second Circuit's decision adopting such a test.

To the contrary, the Second Circuit expressly recited a rule of law that takes into account, as part of the totality of the circumstances, both the language of the release *and* the individual circumstances of the employees who signed the release. (*Pietrowski* Pet. App. 17a-18a.) Release Petitioners themselves concede that this is both the correct rule of law and the rule of law applied by other courts of appeals. (*Pietrowski* Pet. at 12-13.) Their quibble with the way that the Second Circuit *applied* this rule of law to the particular circumstances of this case does not warrant this Court's review.

B. Release Petitioners Waived The Argument That Additional Evidence Is Required In Order To Determine The Validity Of Their Releases.

The *Pietrowski* Petitioners argue that the Second Circuit should have remanded for further development of the factual record regarding their individual circumstances. But Release Petitioners failed to make this argument below. Accordingly, even if their Petition presented an important or controversial question of law (and it does not), this case would be a poor vehicle for resolving any such question.

In the decision below, the Second Circuit reversed the District Court and held that Respondents were entitled to summary judgment on the release issue.

Release Petitioners now for the first time argue that summary judgment was inappropriate because additional fact-finding was required. According to Release Petitioners, the Second Circuit should have "remand[ed] the case to the district court" rather than reverse the District Court on the release issue. (*Pietrowski* Pet. at 8.)

Release Petitioners, however, at no point argued – either in the District Court or the Second Circuit – that additional fact-finding would be necessary were either court to reject their legal arguments regarding the Release language. Having failed to argue below that a remand for additional fact-finding was required, Release Petitioners have failed to preserve this issue for decision by this Court. *See Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that "was inadequately preserved in the prior proceedings"). Certiorari is therefore unwarranted.

C. The Second Circuit Reached The Correct Result In Light Of The Factual Record Before It.

Contrary to *Pietrowski* Petitioners' assertions, the record before the Second Circuit included facts regarding the individual circumstances of each Release Petitioner. These facts, moreover, were undisputed, as Release Petitioners failed to offer any evidence in response to Respondents' factual showings. In light of the undisputed factual record provided by Respondents, the decision of the Second Circuit was correct.

After this case was remanded to the District Court in 2006, Respondents moved for partial summary judgment, asserting that Release Petitioners' claims were barred by the Releases. (A. 1051 *et seq.*) In support of that motion, Respondents came forward with evidence regarding each of the *Laniok* factors (other than the clarity of the release, which is a pure question of law). Specifically, Respondents adduced evidence showing that Release Petitioners (1) were "educated and worked in salaried positions at Xerox for many years," (2) had ample time (45 days) to consider whether to sign the Releases, (3) received significant consideration in exchange for the Releases, (4) were encouraged by Xerox to consult an attorney before signing the Releases, and (5) were represented by counsel at the time they signed the Releases. (A. 1047-49.)[4] Respondents also demonstrated that Plaintiffs' counsel had advised his clients that the Releases in fact would bar their claims in the ongoing *Frommert* litigation. (*Id.*)

Respondents presented a *prima facie* case that the Releases were knowingly and voluntarily given, thereby satisfying their burden on summary judgment.[5] Release Petitioners were therefore

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[4] Respondents conceded that Release Petitioners had no role in deciding the terms of the release.

[5] *See, e.g.*, *Houghton* v. *South*, 965 F.2d 1532, 1536 (9th Cir. 1992) ("Where, as here, the moving party bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial." (quoting *International Shortstop, Inc.* v. *Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991))).

obliged to come forward with whatever evidence they had to defeat Respondents' summary judgment motion. *See* Fed. R. Civ. P. 56(e)(2) ("When a motion for summary judgment is properly made and supported, an opposing party . . . must . . . set out specific facts showing a genuine issue for trial.").[6] But Release Petitioners failed to come forward with *any* evidence regarding their individual circumstances in opposing summary judgment. Nor did they dispute any of the facts adduced by Respondents. Thus, each of the facts adduced by Respondents must be accepted as true, and Release Petitioners are not entitled to ask for consideration of additional facts that were not presented in response to the summary judgment motion. *See* Fed. R. Civ. P. 56(c).

Release Petitioners' assertion that the Second Circuit failed to consider their individual circumstances is therefore incorrect. The Second Circuit decided the release issue based upon the "undisputed facts" provided by Respondents concerning the circumstances of each Release Petitioner. For instance, while Release Petitioners assert that the Second Circuit failed to take into account "the specific education and business experience of individual releasors" (*Pietrowski* Pet. at 20), the "undisputed facts" in the record on summary

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[6] *See also, e.g.*, *Irby* v. *Bittick*, 44 F.3d 949, 953 (11th Cir. 1995) ("Once a moving party has sufficiently supported its motion for summary judgment, the non-moving party must come forward with significant, probative evidence demonstrating the existence of a triable issue of fact.").

judgment included the facts that "*[e]ach* of the[] [Release Petitioners] are educated and worked in salaried positions at Xerox for many years" (A. 1048 (emphasis added)).[7]

Virtually every *Laniok* factor weighed in favor of enforcing the Releases, and Release Petitioners failed to present any evidence suggesting that the Releases were unknowing or involuntary. Accordingly, based on the undisputed factual record before it, the decision of the Second Circuit was correct. Further review is unwarranted.

II. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "FEDERAL COMMON LAW" QUESTION.

The *Frommert* Petitioners (Dkt. No. 08-803) assert – on the facts of this case and in light of the precise language used in the Releases – that the Second Circuit erred in enforcing the Releases signed by Release Petitioners. Notably, they do *not* argue that the Second Circuit employed an incorrect legal standard – let alone a legal standard that is in

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[7] Release Petitioners note that four Plaintiffs carved out the *Frommert* lawsuit from their Releases and that those Releases were accepted by Xerox without any reduction in consideration. (*Pietrowski* Pet. at 19.) According to Release Petitioners, some of their number might have learned of these facts and, if so, "may have concluded" that "*Xerox itself* interpreted the general release to *not* encompass" the *Frommert* litigation." (*Id.* at 20.) This argument is wholly speculative and unsupported by record evidence. It also ignores the undisputed fact that Xerox's acceptance of the adulterated Releases was inadvertent. (*See* Appellants' Brief at 21 n.5.)

conflict with a decision of any other Circuit. To the contrary, Release Petitioners point to the Second Circuit's prior *Finz* and *Laniok* decisions as correctly stating the legal standards governing the enforceability of releases of ERISA claims. (*Frommert* Pet. at 9-10 & n.3, 12.) Accordingly, further review is not warranted.

1. Release Petitioners are unable to point to any rule of law misstated by the Second Circuit. Indeed, Release Petitioners concede that the totality-of-the-circumstances test recited by the Second Circuit is both correct and entirely consonant with decisions of the other Circuits. (*See id.*) Release Petitioners' argument instead boils down to an assertion that the Second Circuit did not properly interpret the language used in the Releases and therefore misapplied the governing legal standard to the facts of this case.

The Releases in question state that Release Petitioners release Respondents from "any and all claims . . . based upon anything" that occurred prior to the signing of the Releases. (*Frommert* Pet. App. 14a.) Release Petitioners, however, argue that the Releases do not bar their claims because of the following Release language: "the consideration set forth in this Release is in addition to anything of value to which I am entitled by law or Xerox policy." (*Frommert* Pet. at 6.) According to Release Petitioners, because they are "entitled by law" to a calculation of benefits that is not premised upon application of the so-called "phantom account" offset provision, the Releases do not bar their claims in this case. (*See id.* at 14.)

As the Second Circuit explained, this argument "conflate[s] the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." (*Frommert* Pet. App. 17a-18a.) Moreover, Release Petitioners' argument that the Second Circuit misapplied the above-quoted Release language to the unique facts of this case does not present an important and recurring issue of federal law requiring this Court's review. The Petition should therefore be denied. *See* Sup. Ct. R. 10.

2. In an attempt to escape this conclusion, Release Petitioners assert that the decision below violated "federal common law" and various "principle[s] of contract interpretation." (*Frommert* Pet. at 12.) Notably, however, each of the principles cited by Release Petitioners is entirely consistent with the totality-of-the-circumstances test applied by the Second Circuit.

Release Petitioners first argue that "the validity of an individual's waiver of pension claims should be subjected to closer scrutiny than waiver of general contract claims." (*Frommert* Pet. at 12 (citing *Finz*, 957 F.2d at 81).) The decision of the Second Circuit is not in conflict with this principle. To the contrary, the Second Circuit held that the Releases were given knowingly and voluntarily only after citing the *Finz* decision for an "articulat[ion]" of the "relevant" law. (*Frommert* Pet. App. 19a (citing *Finz*, 957 F.2d at 82).)

Release Petitioners further argue that a release "drafted by the employer . . . must be construed in

favor of the employee." (*Frommert* Pet. at 13.) The identity of the drafter, however, is among the *Laniok* factors that the Second Circuit indisputably applied in this case. *See* 935 F.2d at 1368 (listing "the role of plaintiff in deciding the terms of the agreement" as among the relevant factors in determining whether a release is knowing and voluntary). This rule of construction, moreover, is irrelevant where the language in question is unambiguous, as the Second Circuit held the Releases were here.[8]

According to Release Petitioners, another relevant "principle of contract interpretation . . . is that courts must ensure that federally protected rights are 'not undermined by private agreements born of circumstances in which employees confront extreme economic pressures or lack information regarding their legal alternatives.'" (*Frommert* Pet. at 12 (citation omitted).) But Release Petitioners are unable to point to any conflict between this alleged

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[8] Release Petitioners also suggest that the Releases were ambiguous because they did not specifically reference the *Frommert* lawsuit (*Frommert* Pet. at 11), but there is no requirement that a specific action – or cause of action – must be expressly referenced in order to be covered by a release, *see generally Chaplin* v. *NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002) (rejecting argument that "for a release to cover an ERISA claim, it must specifically mention ERISA"). The Releases here released "Xerox from any and all claims . . . based upon anything that has occurred prior to the date [he or she] sign[s] the release." (*Frommert* Pet. App. 14a.) This language plainly covered the *Frommert* lawsuit, as evidenced by the fact that Plaintiffs' counsel advised his clients that the Releases covered their claims for recalculation of pension benefits. (*See* A.47- 50.)

rule of construction and the Second Circuit's conclusion, in light of the "undisputed facts" and the "totality of the circumstances," that the Releases should be given effect. (*Frommert* Pet. App. 19a.) Release Petitioners also overlook the fact that they were represented by counsel when they signed the Releases, thereby negating any inference that they lacked "information regarding their legal alternatives." (A. 1049.)

Finally, Release Petitioners assert that the decision below improperly "places the burden" of proof "on plan participants to establish that the release form was not a knowing and voluntary waiver." (*Frommert* Pet. at 9.) Release Petitioners, however, fail to cite any portion of the Second Circuit opinion that does so.

In sum, the decision of the Second Circuit is entirely consistent with the various interpretive principles cited by Release Petitioners. While Release Petitioners assert that the Second Circuit incorrectly applied those principles as part of its totality-of-the-circumstances analysis, nothing in the decision below supports that assertion. Ultimately, Release Petitioners do no more than disagree with the Second Circuit's interpretation of the specific release language at issue and its application of an uncontested legal standard to the particular facts of this case. Their Petition should thus be denied. *See* Sup. Ct. R. 10.

III. THE COURT SHOULD NOT GRANT CERTIORARI ON THE "OWBPA" QUESTION.

The *Frommert* Petitioners also argue that failure to comply with the technical requirements of the OWBPA should render the release of ERISA claims invalid in cases where the release also purports to apply to ADEA claims. (*Frommert* Pet. at 15.) This Court rejected that argument in *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). Moreover, the Releases at issue here fully complied with the OWBPA. Further review of the Second Circuit's OWBPA holding is thus unwarranted.

A. The OWBPA Requirements For Releases Do Not Apply To ERISA Claims.

In 1990, Congress amended the ADEA by passing the OWBPA. The OWBPA provides that "[a]n individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). It then sets forth certain technical requirements that employers must meet in order for a release to be deemed "knowing and voluntary" under the ADEA. *See id.* The requirements include, for example, notification of "the job titles and ages of all individuals eligible or selected for" an exit incentive program. *Id.* at § 626(f)(1)(H)(*ii*).

In *Oubre*, this "Court repeatedly stated that the OWBPA applies *only* to ADEA claims, *and no others*." *Chaplin* v. *NationsCredit Corp.*, 307 F.3d 368, 375 (5th Cir. 2002) (emphasis added). For

instance, the Court expressly contemplated circumstances "where a release is effective as to some claims but not as to ADEA claims." *Oubre*, 522 at 428; *accord Chaplin*, 307 F.3d at 375 ("The Court expressly conceived a case in which a release might bar all claims but an ADEA claim because the release did not comply with the OWBPA.").[9]

Release Petitioners assert that age discrimination claims under the ADEA "should not logically receive a higher degree of protection than an employee's contractual right to a pension." (*Frommert* Pet. at 15.) As this Court made clear, however, the technical requirements set out in the ADEA reflect Congress' judgment that age discrimination claims do deserve greater (or at least different) protections than other claims. *See Oubre*, 522 U.S. at 427 ("The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word."); *see also id.* (stating that the regime implemented by the OWBPA is entirely "separate and apart from contract law"). Accordingly, Release Petitioners' appeal to "logic" is at odds with

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[9] *See also Oubre*, 522 U.S. at 426-27 ("The statutory command is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements."); *id.* at 427 ("An employee 'may not waive' an ADEA claim unless the employer complies with the statute."); *id.* ("The OWBPA governs the effect under federal law of waivers or releases on ADEA claims."); *id.* at 428 ("As a statutory matter, the release cannot bar her ADEA suit, irrespective of the validity of the contract as to other claims."); *id.* ("It suffices to hold that the release cannot bar the ADEA claim."); *id.* ("The statute governs the effect of the release on ADEA claims.").

the legislative judgment reached by Congress in the OWBPA.[10]

Given this Court's holding in *Oubre*, Release Petitioners unsurprisingly cannot point to any conflict in the courts of appeals regarding the applicability of the OWBPA to the release of ERISA claims. No such conflict exists; the Circuits that have considered the issue agree with the Second Circuit that the OWBPA is irrelevant to the question whether a release of non-ADEA claims is knowing and voluntary. *See, e.g.*, *Chaplin*, 307 F.3d at 375-76 ("The language of *Oubre* precludes plaintiffs' argument that the OWBPA applies to a release of an ERISA claim."); *Blackwell* v. *Cole Taylor Bank*, 152 F.3d 666, 673 (7th Cir. 1998) ("There is no counterpart in Title VII land to the [OWBPA], and so [plaintiff]'s waiver of her claim of race discrimination was valid as long as it met the usual criteria for an effective waiver, that is, as long as it was knowing and voluntary.").

In sum, Release Petitioners' argument is inconsistent with a decision of this Court and has been rejected by every Circuit to consider the issue. The writ therefore should be denied.

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[10] Logic, moreover, in no way dictates that various technical requirements under the OWBPA – such as the requirement that employees receive notice of the ages of the individuals eligible to participate in early retirement programs – should have any relevance in determining whether the waiver of an ERISA claim is knowing and voluntary.

B. The Releases At Issue Here Do Not Violate The OWBPA.

Release Petitioners assert that the Releases at issue here violate the OWBPA requirement that an employee waive "rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled." 29 U.S.C. § 626(f)(1)(D). This is because, according to Release Petitioners and the District Court, "the consideration received by [Release Petitioners], *i.e.*, the salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset." (*Frommert* Pet. App. 41a.) This contention misses the mark.

The interpretation of the OWBPA advocated by Release Petitioners would require courts – in evaluating whether a release complies with the OWBPA – to determine on a case-by-case basis whether the consideration provided for the release exceeds the value of the released claims.[11] The OWBPA does not require this extraordinary result.

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[11] For example, consider an employee who provides a release of an age discrimination claim in exchange for $10,000. Under Release Petitioners' theory, the release would be invalid if the employee was "already . . . entitled" by law to an amount exceeding $10,000. The employee's entitlement, moreover, would be measured on Release Petitioners' theory not only by reference to mature and acknowledged obligations but also to contested and indeterminate obligations, including those arising out of the employee's age discrimination claim itself. In other words, if it turned out that the employee was "legal entitled" to back pay in an amount exceeding $10,000, the release would be ineffective.

Rather, the purpose of the OWBPA requirement is to ensure that a release is not given gratuitously. In other words, the OWBPA merely (1) requires that a release be supported by consideration, and (2) underscores that the consideration cannot be illusory but instead must be "in addition to anything of value" to which the employee already has an acknowledged entitlement.

As the Second Circuit cogently observed, "neither the uncertainty of [Release Petitioners' pension] benefits at the time of release nor the fact that hindsight has revealed that such benefits are now worth more than the[y] likely expected at that time [they signed the Releases] can render the[] releases unenforceable." (*Frommert* Pet. App. 19a.) When Release Petitioners' signed the Releases, they received substantial consideration – in the form of a salary continuance – in exchange for a release of "any and all claims," including their contested claims for additional retirement benefits in this action. At that time, they had no legal entitlement to pension benefits recalculated in the manner eventually ordered by the District Court; rather, the proper method of calculating their pension benefits was (and remains) disputed. As such, the consideration they received in exchange for the Releases plainly exceeded anything to which they already were "entitled by law" at the time they signed the Releases.

In sum, because the Releases signed by Release Petitioners clearly comply with the in-any-event irrelevant provision of the OWBPA on which Release Petitioners rely, further review is not warranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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January 2009

Supreme Court, U.S.
FILED
MAY 12 2009
OFFICE OF THE CLERK

Nos. 08-803 & 08-826

IN THE
Supreme Court of the United States

MATTHEW D. ALFIERI, ET AL.,
Petitioners,

AND

KENNETH PIETROWSKI, ET AL.,
Petitioners,

v.

SALLY CONKRIGHT, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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May 12, 2009

AMENDED LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petition for a writ of certiorari in No. 08-803 correctly identified all the parties that participated in the proceedings below but did not separately set forth those specific individuals who are petitioners here and who are seeking relief from the Second Circuit's decision below. Those 14 individuals are:

Matthew D. Alfieri
Lynn Barnsdale
Bruce D. Craig
Richard C. Crater
John L. Crisafulli
Charles R. Drannbauer
James D. Gagnier
Carol E. Gannon
Janice R. Heiler
Gerald A. Leonardo, Jr.
Andrew C. Matteliano
Walter J. Petroff
Irshad Quershi
Joseph E. Wright

In all other respects, the list of parties in the certiorari petition is correct.

TABLE OF CONTENTS

Page

AMENDED LIST OF PARTIES TO THE PROCEEDINGS BELOW i

TABLE OF AUTHORITIES iii

ARGUMENT:

I. *KENNEDY* UNDERMINES THE DECISION OF THE COURT OF APPEALS 3

II. *KENNEDY* PROVIDES AN ADDITIONAL REASON FOR PLENARY REVIEW 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bormann v. AT&T Communications, Inc., 875 F.2d 399 (2d Cir. 1989) 6

Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994) 3

Cuyler v. Sullivan, 446 U.S. 335 (1980) 8

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 4, 10

Finz v. Schlesinger, 957 F.2d 78 (2d Cir. 1992) 6

Kennedy v. Plan Administrator for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360 (2d Cir. 1991) 6

Lawrence v. Chater, 516 U.S. 163 (1996) 8

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 8

STATUTES AND RULES

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:

29 U.S.C. § 1056(d)(3) 3

29 U.S.C. § 1102(a)(1) 3

29 U.S.C. § 1102(b)(4) 3, 5

29 U.S.C. § 1104(a)(1)(D) 3, 5

29 U.S.C. § 1132(a)(1)(B) 5

Sup. Ct. R. 15.8 1

Petitioners in *Alfieri v. Conkright*, No. 08-803, and *Pietrowski v. Conkright*, No. 08-826 (collectively, "the Participants"), a group of current and former employees in the Xerox Corporation Retirement Income Guarantee Plan ("the Plan," a respondent), submit this supplemental brief[1] to present arguments based on this Court's recent decision in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009). In light of *Kennedy*, it is now clear that the court of appeals labored under a basic misunderstanding of the appropriate relationship between the terms of an ERISA plan and an agreement that purports to waive rights to receive benefits under the terms of the plan. In *Kennedy*, this Court held that such a waiver cannot be given effect when doing so would contravene ERISA's several textual directives that benefits be paid according to the documents that comprise the plan. The Court's reasoning further relied on the policy concern those directives embody: a strong federal interest in uniform and efficient plan interpretation without reference to extraneous documentation that must be evaluated under contestable standards.

ERISA's text is equally controlling in this case. As challenged here, the judgment of the court of appeals rests on its conclusion (contrary to that of the district court) that certain reduction-in-force agreements signed by the Participants waived all claims that they held against the Plan and its administrators ("the Plan Administrators," respondents). Because of those waivers, the court of appeals held that,

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[1] Supplemental briefing is appropriate under this Court's Rule 15.8 because *Kennedy* was handed down on January 26, 2009, and therefore was not available at the time of the Participants' last filing in this docket on December 23, 2008.

even though the Plan Administrators had previously violated ERISA by paying lower benefits than the controlling plan documents require (a violation that respondents do not now dispute), the Participants now have no remedy for that violation, and the Plan and its Administrators may continue to pay the Participants lower benefits than the applicable documents specify. That is just the opposite of what ERISA, as interpreted in *Kennedy*, requires.

The rule adopted by the court of appeals also runs contrary to ERISA's policies as explained in *Kennedy*. That rule contemplates that, before determining what benefits to pay a plan participant or beneficiary, plan administrators will not only seek out and construe termination agreements between participants and their employers for waivers of ERISA rights, but also determine whether those waivers were knowing and voluntary. Such a lengthy and uncertain process will impede the timely collection of benefits — or, alternately, will result in arbitrary enforcement of waivers in a limited set of cases against only some participants and beneficiaries.

This Court should grant the petitions for a writ of certiorari, vacate the decision below insofar as the court of appeals held that the Participants had waived their claims, and remand that aspect of the case for reconsideration in light of *Kennedy*. In the alternative, *Kennedy* provides an additional reason for plenary review of the decision below, as the decision of the court of appeals now conflicts with a recent decision of this Court on a question of nationwide importance.

I. *KENNEDY* UNDERMINES THE DECISION OF THE COURT OF APPEALS

In *Kennedy*, this Court confronted the question whether a plan administrator should give effect to a waiver of rights to receive pension benefits under an ERISA plan as a beneficiary when that waiver is not a qualified domestic relations order of the kind described in 29 U.S.C. § 1056(d)(3). Before the Court granted review on that question, the majority view among the circuits had been that such waivers should be given effect if the waiver had been voluntary as evaluated under federal common law. *See, e.g., Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1326-27 (5th Cir. 1994), *cited in Kennedy*, 129 S. Ct. at 870 n.5. In *Kennedy*, however, the Court rejected that view and held that a plan administrator must instead pay benefits according to the terms of the plan itself, regardless of whether the person seeking payment has previously signed a waiver that purports to waive the right to receive those benefits. *See* 129 S. Ct. at 874-78.

In reaching that conclusion, the Court relied primarily on the text and structure of ERISA. It found controlling the statute's instructions that a plan must be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), which must "specify the basis on which payments are made . . . from the plan," *id.* § 1102(b)(4), and that the plan administrator must act "in accordance with the documents and instruments governing the plan," *id.* § 1104(a)(1)(D), save where those documents conflict with ERISA itself. *Kennedy*, 129 S. Ct. at 875. The Court also relied upon ERISA's policy of creating "a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims

and disbursement of benefits." *Id.* (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)) (internal quotation marks omitted, alteration in original). That policy disfavors "enquiries into nice expressions of intent" and protects the processing of claims from invasion by "a multitude of external documents" or litigation "over the meaning and enforceability of purported waivers." *Id.* at 875, 876 (internal quotation marks omitted).

The court of appeals decided this case without the benefit of *Kennedy*'s exposition of the controlling principles. Had it given those principles proper weight, it would not have reached the same result. Here, just as in *Kennedy*, a purported waiver unmoored in the statute or the plan itself has been interposed as a barrier to the payment of benefits that would otherwise be required under the terms of the plan (and that other plan participants will receive). The court of appeals held that the waiver was enforceable because it was knowing and voluntary — in that court's view, the waiver was clear on its face, the plaintiffs who signed had had time to consider their decision and the opportunity to consult with an attorney, and they received consideration for the waiver. *See* Pet. App. 19a-20a.[2] The court reached that conclusion despite its prior holding (unchallenged in this Court) that the Plan Administrators had badly misread the terms of the pre-1998 plan and had failed to pay the Participants the benefits to which, under the Plan documents, they were entitled. *See id.* at 6a.

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[2] Citations to "Pet. App." refer to the appendix to the petition in No. 08-803.

The decision below thus recognizes the purported waivers signed by the Participants as a "basis on which payments [may be] made . . . from" — or not made from, which amounts to the same thing — "the plan," 29 U.S.C. § 1102(b)(4), and as an unwritten exception to the respondent Administrators' obligation to act "in accordance with the documents and instruments governing the plan," *id.* § 1104(a)(1)(D). It therefore cannot be reconciled with a "straightforward rule of hewing to the directives of the plan documents," *Kennedy*, 129 S. Ct. at 875, to determine what benefits to pay to whom. Further, this case, like the one in *Kennedy*, is an "action . . . to recover benefits due . . . under the terms of [the] plan," 29 U.S.C. § 1132(a)(1)(B), a cause of action that "reinforces the directive" that a plan administrator must determine the benefits that are due by reference to the plan itself, *Kennedy*, 129 S. Ct. at 875. The court of appeals has held, and the Plan Administrators do not now dispute, that they have failed to pay benefits due under the Plan. *See* Pet. App. 6a.

Moreover, the rule applied by the court of appeals creates just the same impediments to smooth and efficient plan administration that this Court found unacceptable in *Kennedy*. Consider the case of a former Xerox employee who was *not* a plaintiff in this case, but to whom the Plan Administrators have applied their phantom-account offset. The district court expressed the belief that the offset could not lawfully be applied to such an individual, calling it "beyond dispute . . . that use of a 'phantom account' in the manner found unlawful by the Second Circuit decision violates ERISA and cannot be used by *any* plan," and observing that "[i]t is presumed that no plan administrator would knowingly violate ERISA."

Id. at 47a n.9. Yet, under the rule applied by the Second Circuit, the Plan Administrators could still apply their unlawful offset if (but only if) the employee had knowingly and voluntarily waived his or her rights in the interim. To make that determination, the Plan Administrators would need to determine that the waiver had been made in the first place; determine whether by its terms it encompassed the claim that they had violated ERISA by applying the phantom-account offset contrary to the plan documents; and apply a nonexhaustive multifactor test to determine whether the waiver had been knowing and voluntary. *See id.* at 15a-16a (the court of appeals, citing *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992), which applied six factors); *id.* at 35a-36a (the district court, citing *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 402-03 (2d Cir. 1989), which applied eight factors).[3]

Doing these things is not straightforward, as the history of this case demonstrates. The language of the waivers provided that the "consideration set forth in this Release [was] in addition to anything of value to which [a Participant is] entitled by law or Xerox policy." *Id.* at 80a (internal quotation marks omitted). The district court and the court of appeals disagreed about whether this language made the waivers ambiguous. The district court correctly observed

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[3] As set forth in the petitions (No. 08-803, at 8-11; No. 08-826, at 18), the court of appeals departed from governing principles of federal common law in its application of the factors set forth in *Finz*, in *Laniok v. Advisory Committee of Brainerd Manufacturing Co. Pension Plan*, 935 F.2d 1360 (2d Cir. 1991), and in other cases. Clarification of these principles remains of sufficient national importance to warrant plenary review. *Kennedy*, however, calls sharply into question whether those principles were even properly invoked in this case.

that this language "suggests that [the Participants] did *not* waive any then-pending claims alleging an entitlement to some particular benefits," *id.* at 40a, and that, in light of the court of appeals' earlier holding, the Participants "were 'entitled by law' not simply to receive *some* pension benefits, but to have their benefits calculated without any reduction attributable to a 'phantom' account," *id.* at 38a. The court then applied the established rule that "any ambiguity [in the waivers] should be resolved against Xerox, which drafted" them, *id.* at 39a, and held that they did not bar the Participants' claims.

The court of appeals, however, disagreed, reasoning that the language on which the district court relied dealt only with "the existence of consideration adequate to render a release enforceable," and not to "the scope of claims thereby released." *Id.* at 17a-18a. It apparently believed that, so long as the Plan Administrators had not "den[ied] [the Participants] any and all pension benefits," *id.* at 18a, they had given the Participants what they were entitled by law to receive under the terms of the waiver. This Court need not address the merits of that implausible conclusion in order to observe that federal judges disagree over the proper reading of the waivers' terms. That disagreement is potent evidence that the court of appeals' rule, like the one rejected in *Kennedy*, would "destroy a plan administrator's ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court." 129 S. Ct. at 876.

In sum, the rule applied by the Second Circuit is incompatible with this Court's intervening decision

in *Kennedy*.[4] That decision is therefore an "intervening development[] . . . [that] reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"; further, "such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Indeed, the stark contrast between *Kennedy*'s model of ERISA litigation and the proceedings in this case demonstrates that there is more than a "reasonable" probability of a different result after remand. The conditions under which this Court will vacate a decision and remand for further consideration are thus fully met.[5]

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[4] The Participants' argument based on *Kennedy* is properly before this Court. The court of appeals held that the Participants' purported waiver of their claims was knowing and voluntary and therefore that "the releases signed by [the Participants] are enforceable." Pet. App. 20a. This reasoning endorsed the proposition that the knowing-and-voluntary standard properly applies to this case under federal common law. "[R]eview of an issue not pressed" below is consistent with this Court's practice "so long as [that issue] has been passed upon." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks omitted, third alteration in original). Similarly, the petitions for certiorari (filed before *Kennedy* was decided) raise the question of the appropriate federal common law principles that apply here. Whether any such principles properly apply is a "predicate to an intelligent resolution" of that question. *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) (internal quotation marks omitted).

[5] Vacatur and remand are appropriate only in Nos. 08-803 and 08-826, and the Participants urging vacatur include only those individuals whom the court of appeals held had waived their claims and who are petitioners under those two docket numbers. *Kennedy* has no relevance to the questions presented in No. 08-810. The former and current employees who are respondents there and whose claims have *not* been held waived

II. *KENNEDY* PROVIDES AN ADDITIONAL REASON FOR PLENARY REVIEW

In the alternative, this case is an excellent vehicle for this Court to clarify immediately that its holding in *Kennedy* prohibits the federal courts from giving effect to putative federal common law waivers not merely in the specific context of domestic relations, but whenever such a waiver is interposed as a barrier to the payment of benefits according to the terms of ERISA plan documents. The principles set forth in *Kennedy* apply to both contexts, but it would blink reality to suggest that employers and plans around the country will accept *Kennedy* in cases unrelated to domestic relations without further litigation.

This case presents that broadly significant question in a particularly important fact pattern. Layoffs of the kind that occurred here are regrettably common in today's economic environment, as are termination agreements that purport to waive all claims an employee may have against a former employer in exchange for a severance package, salary continuance, or other financial relief to soften the blow of the layoff. The question whether workers who are laid off and who sign (as practically all do) a standard-form release should obtain the benefit of a judicial determination of the meaning of their pension plan — or, instead, be bound by common law waiver to a plan administrator's erroneous and unlawful construction — is therefore of importance beyond the facts of this case. *See* Pet. 9-11.

For the reasons set forth above, the decision of the court of appeals conflicts with *Kennedy*, a recent

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certainly do not seek vacatur but rather have explained in detail why the petition in No. 08-810 should be denied.

decision of this Court. Further, the appropriate application of *Kennedy* to these facts is an important question of federal law that has not been, but should be, decided by this Court. That is particularly so because of the strong federal interest in the "nationally uniform . . . administration" of ERISA plans, *Egelhoff*, 532 U.S. at 148. Accordingly, if this Court chooses not to vacate and remand for further consideration in light of *Kennedy*, plenary review is appropriate.

CONCLUSION

This Court should grant the petitions for a writ of certiorari in Nos. 08-803 and 08-826, vacate the decision below insofar as the court of appeals held that the Participants had waived their claims, and remand that aspect of the case for further consideration in light of *Kennedy*. In the alternative, those two petitions for a writ of certiorari should be granted and the case should be set for argument on the merits.

Respectfully submitted,

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May 12, 2009

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

Nos. 08-803, 08-826

IN THE
Supreme Court of the United States

MATTHEW D. ALFIERI, ET AL.,
KENNETH PIETROWSKI, ET AL.,

Petitioners,

v.

SALLY L. CONKRIGHT, ET AL.,

Respondents.

On Petition For A Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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June 2009

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

SUPPLEMENTAL BRIEF 1

I. *KENNEDY* IS ENTIRELY INAPPOSITE TO THE RELEASES AT ISSUE HERE. 2

II. RELEASE PETITIONERS DID NOT RELY ON ERISA'S PLAN DOCUMENTS PROVISION BELOW. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 9

Auer v. *Robbins*, 519 U.S. 452 (1997) 9

Finz v. *Schlesinger*, 957 F.2d 78 (2d Cir. 1992) 7

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) 8

Kennedy v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009) ..... *passim*

Lawn v. *United States*, 355 U.S. 339 (1958) 9

Leavitt v. *Northwestern Bell Telephone Co.*, 921 F.2d 160 (8th Cir. 1990) 7

Smart v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995) 7

Stobnicki v. *Textron, Inc.*, 868 F.2d 1460 (5th Cir. 1989) 4-5

United States v. *Williams*, 504 U.S. 36 (1992) 2

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 8, 9

STATUTES

29 U.S.C. § 1056 2

29 U.S.C. § 1104 3

SUPPLEMENTAL BRIEF

Respondents in Nos. 08-803 and 08-826 file this supplemental brief in response to the brief filed by Plaintiffs-Appellees-Petitioners (Release Petitioners) regarding this Court's decision in *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan,* 129 S. Ct. 865 (2009). As the Government correctly observes, and contrary to Release Petitioners' assertions, *Kennedy* "provides no basis for either plenary review or vacating the decision below and remanding for further proceedings" on the release issue. Br. U.S., at 21.

Kennedy presented the question whether, in determining how to distribute benefits, a plan administrator must give effect to a beneficiary's waiver of benefits that was not executed "in accordance with the [plan] documents." 129 S. Ct. at 875 (quoting 29 U.S.C. § 1104(1)(D)). Emphasizing the importance of minimizing burdens on plan administrators, the Court held that, under ERISA's plan documents rule, a plan administrator may ignore waivers that conflict with plan terms.

This narrow holding is entirely inapposite here, where the Plan is silent on the releases at issue and enforcement of the releases thus does not conflict with Plan terms. Moreover, unlike the waiver in *Kennedy,* the releases here were obtained *for the benefit* of the plan administrator, as they required Release Petitioners to relinquish *disputed* claims to benefits. Precluding their enforcement thus would *dis*serve the ERISA goal of minimizing the burden on plan administrators. *See* Br. U.S., at 21

(distinguishing *Kennedy* from this case on the ground that, unlike the waiver in *Kennedy*, "the releases here purport to cover claims against the plan and its administrator, and the release petitioners' entitlement to benefits was in dispute when they signed the releases"). Accordingly, *Kennedy* provides no support for Release Petitioners' petitions, which should be denied.

Review of Release Petitioners' new statutory claim should also be denied because it was not "pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted), and thus, as the Government agrees, "is not properly before this Court," Br. U.S., at 21.

I. *KENNEDY* IS ENTIRELY INAPPOSITE TO THE RELEASES AT ISSUE HERE.

Release Petitioners' contention that the releases are invalid under *Kennedy* is incorrect. Nothing in the language of *Kennedy*, the statutory provisions it construes, or the policies that underlie it calls into question the Second Circuit's decision to enforce the releases signed by Release Petitioners.

1. In *Kennedy*, the Court first considered whether a former spouse's waiver, in the context of a divorce decree, of her right to survivor benefits under her ex-husband's pension plan violated ERISA's anti-alienation provision, 29 U.S.C. § 1056(d), and was therefore *per se* void under ERISA. *Kennedy*, 129 S. Ct. at 873. After holding that such a waiver is not an "inevitable nullity," the Court turned to the question whether the waiver is "effective where [it] is *inconsistent with plan documents*." *Id.* at 870

(emphasis added). The Court concluded that where the plan documents "provide that the plan administrator will pay benefits to a participant's designated beneficiary, with designations and changes to be made in a particular way," the plan need not honor designations or changes that are not made in the required manner. *Id.* at 877.

In reaching this conclusion, the Court relied on a provision of ERISA requiring plan administrators to act "in accordance with the [plan] documents." 29 U.S.C. § 1104(a)(1)(D). The Court explained that this plan documents provision serves "the congressional goal of minimizing the administrative and financial burdens on plan administrators" by enabling plan administrators "to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court." *Kennedy*, 129 S. Ct. at 876 (internal quotation marks omitted). By reducing the burdens on plan administrators, the Court observed, the plan documents rule promotes "simple administration, . . . and ensur[es] that beneficiaries get what's coming quickly." *Id.* at 875-76 (internal quotation marks omitted and brackets altered).

Applying the plan documents rule to the facts presented, *Kennedy* upheld the plan administrator's decision to distribute the benefits to the participant's ex-wife because she remained the participant's designated beneficiary and because the plan-prescribed method for disclaiming her interest had not been not followed. *See id.* at 877.

Contrary to Release Petitioners' sweeping assertion, *Kennedy* does not "prohibit[] the federal courts from giving effect to" a release "whenever such a [release] is interposed as a barrier to the payment of benefits according to the terms of ERISA plan documents." Pets. Supp. Br. (Nos. 08-803 & 08-826), at 9. *Kennedy* held only that plan administrators are not required to give effect to waivers that are "inconsistent" with plan terms; it reserved the questions whether a waiver may be enforced "in circumstances in which [the waiver] is consistent with plan documents," 129 S. Ct. at 875 & n.10, or in which the plan simply does not address waiver at all, *see id.* at 877 n.13.

Here, no provision of the Xerox Plan prohibits participants from executing a release of a disputed claim for benefits. While Release Petitioners suggest that they were "entitled by law" to benefits calculated without reference to the phantom account offset methodology (Pets. Supp. Br., at 6-7), their claims were disputed and being actively litigated at the time they gave their releases. *See* Resp. Consol. Br. Opp. (Nos. 08-803 & 08-826), at 4-6; Br. U.S., at 21 (observing that, unlike the waiver in *Kennedy*, "the release petitioners' entitlement to benefits was in dispute when they signed the releases"). Because Release Petitioners' claims to benefits were in dispute, nothing in ERISA or the plan terms precluded them from releasing those claims. *E.g.*, *Stobnicki* v. *Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989) ("[A] controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other.").

Nor does the Plan impose a particular procedure or format for securing a release that was not followed here.[1] Accordingly, *Kennedy* does not address the releases signed by Release Petitioners, much less preclude their enforcement.

2. The main rationale this Court cited for applying the plan document rule in *Kennedy*, moreover, was to minimize the burden on plan administrators faced with conflicting instructions on how to distribute benefits. By allowing plan administrators to ignore extra-plan documents that conflict with plan terms, the Court sought to prevent plan administrators from "be[ing] drawn into litigation" and subject to "double liability" for their benefits determinations. *Kennedy*, 129 S. Ct. at 875-76.

Here, permitting enforcement of the releases that Release Petitioners gave in exchange for severance

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[1] The release itself expressly advised Release Petitioners to consult with an attorney before signing a release, recommended that they take sufficient time in deciding whether to sign a release, gave them 45 days to consider the release before returning it to Xerox, and gave them another seven days to revoke the release after signing it. *See* Resp. Consol. Br. Opp., at 5. Moreover, Plaintiffs' counsel was aware of the releases and understood that their execution would bar his clients' claims: counsel asked the District Court (unsuccessfully) to issue an order barring Defendants from seeking a release of their claims in this case. *See id.* at 5-6.

payments does not encourage litigation against the Plan, much less subject it to double liability. To the contrary, permitting enforcement of releases obtained for the benefit of ERISA plans would discourage litigation and reduce burdens on plan administrators. That the goals the plan documents rule are designed to serve are *advanced* by enforcing the releases illustrates that Release Petitioners' reading of *Kennedy* stretches its holding far beyond the circumstances to which it applies.[2]

3. The implications of Release Petitioners' expansive reading of *Kennedy* are far-reaching. It is well established that releases of disputed claims for ERISA benefits are effective so long as they are knowing and voluntary under the totality of the

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[2] *Kennedy* is also inapposite because the waiver at issue there is fundamentally different from the releases executed here. The designated beneficiary in *Kennedy* purported to relinquish her interest in her ex-husband's pension benefits. That decision thus directly implicated the plan administrator's duty to distribute the benefits as prescribed by the plan. Here, by contrast, the Release Petitioners merely released their right to dispute the way that the Plan Administrator had determined their benefits in the first instance. Thus, while the waiver in *Kennedy* purported to tell the plan administrator how to distribute benefits in the first instance, the releases here merely foreclose a *challenge* to the way the Plan Administrator distributed benefits in the first instance.

circumstances. *See, e.g.*, *Smart* v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181-182 (1st Cir. 1995); *Finz* v. *Schlesinger*, 957 F.2d 78 (2d Cir. 1992); *Leavitt* v. *Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990). Release Petitioners nevertheless argue that this Court in *Kennedy* overruled this settled precedent without any acknowledgment that it was doing so. In fact, as explained above, *Kennedy* has no bearing on whether an ERISA plan participant may – in exchange for valuable consideration – release a disputed claim for pension benefits. The standard for a valid release has been and remains whether the release was knowingly and voluntarily given, and the Second Circuit properly determined that the releases at issue here were knowing and voluntary on the "undisputed facts" of this case. *See* Resp. Consol. Br. Opp., at 9-10, 15-18.

II. RELEASE PETITIONERS DID NOT RELY ON ERISA'S PLAN DOCUMENTS PROVISION BELOW.

As the Government correctly observes, Release Petitioners' eleventh-hour plan documents claim "is not properly before this Court." *See* Br. U.S., at 21. Release Petitioners did not raise this statutory question in their petitions, and the question is not fairly included within the questions they presented to the Court. Release Petitioners, moreover, have waived their statutory claim because they failed to present it to the courts below – indeed, they presented a *contradictory* claim below. Accordingly, it would be inappropriate for the Court to consider this new statutory question. It would also be

imprudent, because the Court would not have the benefit of the lower courts' treatment of the issue.

1. Supreme Court Rule 14 provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." A question that is merely "complementary" or "related" to the question presented in the petition is not "fairly included therein." *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992) (holding that question whether an ordinance affected a regulatory taking was not fairly included within question whether it affected a physical taking) (internal quotation marks omitted). The Court will "consider questions outside those presented in the petition for certiorari . . . only in the most exceptional cases." *Id.* at 535 (citations and internal quotation marks omitted).

Here, the petitions do not assert that the releases are invalid or unenforceable on the ground that they violate any provision of ERISA. Rather, the petitions argue that the Second Circuit incorrectly concluded, as a matter of federal common law, that the releases were knowing and voluntary. The question whether the releases are invalid under ERISA's plan documents provision is "quite distinct, both analytically and factually," from whether the releases were knowingly and voluntarily given. *See Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (declining to entertain "analytically and factually" distinct question). Because Release Petitioners' new statutory claim is not fairly included within their questions presented, review by the Court is inappropriate.

2. Release Petitioners failed to raise the statutory claim not only in their petitions, but also in the courts below. Indeed, by arguing to the courts below that the releases were invalid because they were not knowingly and voluntarily given, Release Petitioners' argument below was *inconsistent* with their new (and novel) assertion that the knowing and voluntary standard does not apply.

As this Court has repeatedly recognized, prudence "dictates awaiting a case in which [an] issue was fully litigated below, so that [the Court] will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee*, 503 U.S. at 538 (citing *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990)). For that reason, the Court routinely declines to consider claims that were not preserved in the proceedings below. *See, e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Lawn* v. *United States*, 355 U.S. 339, 362 n.168 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below."). Release Petitioners do not identify any principled basis for the Court to deviate from this regular practice – or the Court's practice of allowing issues to percolate in the lower courts before granting certiorari – in this case.

3. While Release Petitioners do not dispute their failure to preserve their new statutory claim, they make the remarkable assertion that the Second

Circuit "passed upon" the issue. Pets. Supp. Br., at 8 n.4. Contrary to their assertion, the Second Circuit did not "pass[] upon" the statutory issue that they now seek to raise.

According to Release Petitioners (*id.*), the Second Circuit passed upon the statutory issue because it (implicitly) determined that the federal common law standard properly applied to this case. The Second Circuit's failure to consider an entirely distinct statutory claim, not presented by the parties, however, plainly is not tantamount to a rejection of that claim. Under any fair reading of the Second Circuit's decision, it is clear that the Second Circuit did not pass upon the question whether ERISA's plan documents provision renders the release of disputed claims for pension benefits invalid. Accordingly, it would be inappropriate and imprudent for the Court to grant Release Petitioners' petitions.

CONCLUSION

The petitions for writs of certiorari should be denied.

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130

(8)

No. 08-810

Supreme Court, U.S.
FILED
JUN 8 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,

Petitioners,

v.

PAUL J. FROMMERT, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

SUPPLEMENTAL BRIEF 1

I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION. 1

A. Trust Law Mandates Deference To The Plan Administrator. 3

B. The Decision Below Was Not Premised On The Fact That The Plan Administrator Interpreted The "Same Terms" On Remand. 8

C. The Plan Is Not "Silent" Regarding The Offset 9

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION. 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Canseco v. *Construction Laborers Pension Trust*, 93 F.3d 600 (9th Cir. 1996) 7

Colton v. *Colton*, 127 U.S. 300 (1888) 4

Eaton v. *Eaton*, 132 A. 10 (N.H. 1926) 4

Finch v. *Wachovia Bank & Trust Co.*, 577 S.E.2d 306 (N.C. Ct. App. 2003) 5

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 3, 5, 6

Gallo v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996) 12

Halpin v. *W.W. Grainger, Inc.*, 962 F.2d 685 (7th Cir. 1992) 7

Metropolitan Life Insurance Co. v. *Glenn*, 128 S. Ct. 2343 (2008) 3, 5, 6

Oliver v. *Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008) 6, 9

Pakovich v. *Broadspire Services, Inc.*, 535 F.3d 601 (7th Cir. 2008) 6, 9

Sullivan v. *Sullivan*, 12 N.W.2d 148 (Neb. 1943) 5

TREATISES

III William F. Fratcher, Scott on Trusts (4th ed. 1988) 4

SUPPLEMENTAL BRIEF

Petitioners submit this brief in response to the brief of the United States as *amicus curiae*.

I. REVIEW SHOULD BE GRANTED ON THE FIRST QUESTION.

The Second Circuit held that it had no obligation to defer to the Plan Administrator's interpretation of the Plan on remand from *Frommert I* because there was no Plan Administrator "decision" to which deference could be accorded. Pet. App. 13a. This holding carves out a broad and unwarranted exception to the rule of *Firestone* deference and conflicts with decisions of this Court and other Circuits. *See* Pet. 11-22.

The Government reaches a different conclusion based on an incorrect framing of the decisions below. According to the Government, no deference was due to the Plan Administrator's Plan interpretation on remand because the task on remand was simply to "craft[] a remedy for the administrator's ERISA violations." Br. U.S. 11. In fact, the task on remand was to interpret the remaining Plan provisions that were unaffected by the Second Circuit's finding of a technical ERISA disclosure violation.

In *Frommert I*, the Second Circuit held that the Plan did not properly disclose, and so could not apply, its "phantom account" methodology to participants until 1998. Pet. App. 51a. It then remanded for a determination of the correct offset to Respondents' benefits in light of the "ambiguous manner in which the pre-[1998] terms of the Plan"

addressed this offset question. *Id.* Furthermore, the Second Circuit rejected Respondents' claim for equitable relief because the relief Respondents sought – "recalculation of their benefits consistent with [Plan] terms" – fell "comfortably within the scope of § 502(a)(1)(B)," which allows a plan participant to sue for benefits due "under the terms of [the] plan." *Id.* 53a. Thus, the task on remand was to interpret, for the first time, the pre-1998 Plan terms – *not*, as the Government suggests, to craft an equitable remedy for an ERISA violation.

The Government makes three specific arguments that the decision below was correct, but each is undermined by the Government's erroneous characterization of the task presented on remand. First, the Government argues that trust law authorizes courts to strip plan administrators of *Firestone* deference if they make a mistake in determining the benefits due to plan participants. Second, the Government argues that no deference was due to the Plan Administrator because the Plan Administrator had previously interpreted the same Plan terms in a manner that violated ERISA. Third, the Government argues that no deference was due because the Plan terms were "silent" regarding the proper method for calculating Respondents' benefits. As demonstrated below, each of these contentions is without merit. Because this question is of great practical and precedential significance, the Court should grant the Petition.

A. Trust Law Mandates Deference To The Plan Administrator.

1. Under this Court's decisions in *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), and *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), a deferential standard of review applies to a plan administrator's interpretation of plan terms to the extent provided by the plan documents and the common law of trusts. *See Glenn*, 128 S. Ct. at 2347-48. The Second Circuit's holding that no deference was due the Plan Administrator's interpretation of Plan terms conflicts with these decisions.

The Government responds that trust law permits a court to override a trustee's discretion to interpret the terms of a trust and "make its own judgment about the benefits due" to a trust beneficiary if the trustee has previously made an "[un]reasonable" or "arbitrary" decision regarding the distribution of trust assets. Br. U.S. 11-12. In the Government's view, this rationale for stripping away *Firestone* deference applies even to cases in which the plan administrator's "arbitrary" or "unreasonable" decision consists of a failure to recognize a technical ERISA disclosure violation that affects the distribution of benefits. *See supra* 1-2. The Government's reasoning likewise authorizes stripping away deference whenever a plan administrator makes an arbitrary finding of fact or unreasonably interprets plan terms. Contrary to the Government's assertion, however, trust law generally allows courts to disregard a trustee's discretionary authority only where the trustee's

conduct is marred by fraud, bad faith, or the like – circumstances that no one contends are present here.

The Government is correct that in reviewing a trustee's distribution of assets, a "court may, *in appropriate circumstances*, itself fix the amount that the trustee shall pay rather than defer to the trustee to determine a reasonable amount." Br. U.S. 11. (internal quotation marks omitted) (emphasis added). However, trust law distinguishes between merely erroneous exercises of discretion, on the one hand, and more troubling conduct, such as fraud or dishonesty, on the other. *See, e.g.*, III William F. Fratcher, Scott on Trusts § 187.1, at 27-31 (4th ed. 1988). In the former case, courts continue to defer to the trustee's judgment; only in the latter case may courts step into the shoes of the trustee. *Id.* Indeed, this Court itself has recognized that courts should not ordinarily control a trustee's discretion where "there is no *mala fides*." *Colton* v. *Colton*, 127 U.S. 300, 320-21 (1888).

Numerous other decisions likewise hold that trustees who erroneously but in good faith interpret the terms of trust instruments may not be stripped of discretion. For example, in *Eaton* v. *Eaton*, the New Hampshire Supreme Court reversed a lower court's decision fixing the amount to be paid for child support. *See* 132 A. 10, 11 (N.H. 1926). Although the court agreed that the trustee had erroneously denied support for the child *entirely*, it held that the trustee – not the court – was entitled to determine the *amount* of support due to the child. *Id.* Deference

was given to the trustee notwithstanding the trustee's earlier abuse of discretion.[1]

Here, the Second Circuit did not find that the Plan Administrator acted dishonestly or in bad faith in applying the "phantom account" offset. Rather, it held that the Plan had not properly disclosed, and so could not apply, the phantom account offset methodology until 1998. Pet. App. 50a-51a. Under these circumstances, both trust law and this Court's decisions in *Firestone* and *Glenn* require deference to the Plan Administrator's determination of the benefits due under the pre-1998 Plan terms.

The Government's contrary view presents an issue of great importance. According to the Government, once a plan administrator makes a mistake of law or unreasonably interprets an ERISA plan, a reviewing court may disregard *Firestone* deference and "make its own judgment about the

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[1] *Accord Sullivan* v. *Sullivan*, 12 N.W.2d 148, 151 (Neb. 1943) (upholding lower court's decision that trustee had improperly denied support, but reversing its decision to fix the amount of support because "the court cannot act for the trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act"); *Finch* v. *Wachovia Bank & Trust Co.*, 577 S.E.2d 306, 309-10 (N.C. Ct. App. 2003) (affirming lower court's finding that trustee had "abused its discretion" but vacating order to distribute funds because the trustee still had "discretion whether to disburse any funds").

benefits due." Br. U.S. 11. Such a hair-trigger rule for withdrawing deference would conflict with this Court's decisions in *Firestone* and *Glenn*, would thrust courts into the role of administering pension plans with alarming frequency, and would discourage employers from offering employee benefit plans in the first place. *See* Business Roundtable Amicus Br. 8-12.

2. In arguing that the Second Circuit's decision was correct because *Firestone* deference is no longer required after a plan administrator initially abuses its discretion, the Government underscores the conflict between the Second Circuit's decision and decisions of the Seventh and Eleventh Circuits. The latter Circuits have held that a plan administrator must be given deference in calculating benefits even after the administrator has been found to have arbitrarily and capriciously denied benefits entirely. *See Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008); *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 605-06 (7th Cir. 2008). The rule espoused by the Government – under which deference would be a matter of judicial choice in such circumstances – cannot be reconciled with these decisions.

The Government cites decisions from the First and Ninth Circuits for the proposition that courts have discretion to calculate benefits after finding that a plan administrator arbitrarily and capriciously denied benefits. Br. U.S. 11-12. The cited decisions, however, do not involve plan

interpretation, and thus are inapposite. *See* Pets. Reply Br. 12-13.[2]

The Ninth Circuit decisions, moreover, themselves recognize that, in cases in which a plan administrator "has construe[d] a plan provision erroneously and therefore has not yet had the opportunity of applying the [p]lan, properly construed," the administrator's interpretation of the "properly construed" plan is entitled to deference. *Canseco* v. *Construction Laborers Pension Trust*, 93 F.3d 600, 609 (9th Cir. 1996) (internal quotation marks omitted) (alterations in original); *see* Br. U.S. 12. Contrary to this Ninth Circuit rule, the Second Circuit here declined to defer to the Plan Administrator's interpretation of the pre-1998 Plan terms after the Second Circuit held that the phantom account offset methodology was inadequately disclosed and therefore void before 1998.

Finally, even if the Government were correct that the First and Ninth Circuit decisions are consistent with the decision below, this would only demonstrate the need for this Court to resolve a split among the First, Second and Ninth Circuits, on the one hand, and the Seventh and Eleventh Circuits, on the other.

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[2] The Government also cites a Seventh Circuit decision that is particularly off-point. *See Halpin* v. *W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992) (affirming reinstatement of disability benefits because plan's claims procedure failed to comply with ERISA's "full and fair review" requirement).

B. The Decision Below Was Not Premised On The Fact That The Plan Administrator Interpreted The "Same Terms" On Remand.

The Government also argues that the decision below is correct because this case involves a "second attempt" to interpret the "same" Plan terms. Br. U.S. 14-15. The Government is mistaken.

First, the Second Circuit did not withdraw *Firestone* deference on the ground that the Plan Administrator was giving his second-best interpretation of the same Plan terms. Pet. App. 13a. Rather, it held that no deference was due "because the plan administrator never rendered any *decision* other than the original benefit determinations, all of which were premised on the now-impermissible 'phantom-account' offset mechanism." *Id.* (emphasis added). The court rejected the Plan Administrator's interpretation of the pre-1998 Plan terms as a "mere *opinion*" offered in litigation. *Id.*

Second, it is at most rhetorically true that the Plan Administrator construed the same Plan provisions on remand as it did in its original benefits determination. Since the early 1980s, the Plan Administrator has calculated benefits of rehired employees pursuant to the phantom account methodology. *Id.* 83a-84a. The Plan Administrator, moreover, believed that this approach was supported by Plan provisions other than the non-duplication of benefits provision. *See id.* 66a-67a; 86a. In *Frommert I*, however, the Second Circuit held that the phantom account methodology was inadequately disclosed,

and was therefore void, until 1998. *Id.* 51a-52a. Accordingly, the interpretive question at issue here – *i.e.*, how the offset should be applied based on the non-duplication of benefits provision alone – arose for the first time on remand.

Third, the Second Circuit's decision cannot be meaningfully distinguished from *Oliver* and *Pakovich* on the ground that the Plan Administrator interpreted the "same terms" on remand. In those cases, the courts of appeals mandated deference to the plan administrator's benefits determination *after* the plan administrator's arbitrary and capricious denial of benefits. It cannot be right that a plan administrator who denies benefits entirely is owed continuing deference, whereas an administrator who grants benefits but miscalculates the amount is not. Thus, for purposes of applying *Firestone* deference, there is no principled way to distinguish the errors in *Oliver* and *Pakovich* from the initial error here.

C. The Plan Is Not "Silent" Regarding The Offset.

The Government – unlike Respondents – also contends that the pre-1998 Plan was "silent" regarding the proper calculation of the offset. Br. U.S. 3-4, 9, 13, 14, 16-17. This is incorrect and not what the Second Circuit held.

1. As the Second Circuit recognized in *Frommert I*, the Xerox Plan has "always contained provisions concerning the offset of prior distributions," including the non-duplication of benefits provision. Pet. App. 26a-28a. Accordingly, as the Second Circuit explained, the task on remand was to determine

under the "pre-amendment terms of the Plan" – *i.e.*, pursuant to the non-duplication of benefits provision and without reference to so-called phantom accounting – "how prior distributions were to be treated." *Id.* at 51a.

The Government asserts that the Plan is "silent" on this question and that the Second Circuit therefore "concluded that the pre-1998 Plan (including its non-duplication-of-benefits provision), did not address how to calculate" the offset for prior distributions. Br. U.S. 9. But the Second Circuit did not hold that the pre-1998 Plan terms were "silent" regarding the calculation of the offset; it held that those Plan terms were "ambiguous." Pet. App. 51a. The court also rejected Respondents' claim for equitable relief because "adequate relief' was available from a determination of the benefits due under the terms of the pre-amendment plan. *Id.* 53a-54a.

To be sure, the Second Circuit stated in passing that the pre-1998 Plan "did not *specify* how the Plan would account for the prior distributions," *id.* 28a-29a (emphasis added), but to "specify" means "[t]o state explicitly," Webster's II New College Dictionary (3rd ed. 2005). Failure to state something *explicitly* is entirely consistent with ambiguity. And ambiguity is not a grounds to deny deference but a predicate for deference.

On remand from *Frommert I*, moreover, the District Court plainly understood its task to be interpreting the pre-1998 Plan. *See* Pet. App. 104a ("The Court's task, as directed by the Court of

Appeals, is simply to determine, based on the language of the Plan and the SPD, what benefits are now due...."). The Government is therefore mistaken in suggesting that the courts below held that the pre-1998 Plan was "silent" with respect to the calculation of the offset.

2. There is good reason why the courts below stopped short of holding that the Plan was silent regarding the calculation of the offset. On remand from *Frommert I*, the Plan Administrator submitted a considered interpretation of the pre-1998 Plan terms. *See id.* 144a-54a. This submission makes clear that the pre-1998 Plan was *not* silent regarding the offset.

The Plan calculates benefits for re-hired employees by taking account of *all* of the employees' service to Xerox, including service rendered before their re-hire date. *Id.* 25a-26a. Thus, in the absence of an appropriate offset to take account of the distributions that rehired employees received upon their initial departures, such employees would receive double credit for their initial service. *See* Pet. 5. The Plan's non-duplication of benefits provision is what prevents such double payments.

That provision states that the final retirement benefit of a rehired employee "shall be offset by the *accrued benefit* attributable to such distribution." Pet. App. 141a (emphasis added). The term "accrued benefit" is defined by the Plan, in pertinent part, as "[t]he normal retirement benefit which a [participant] has earned up to any date, and which is payable at Normal Retirement Date" – *i.e.*, as an age

65 annuity – "computed in accordance with ... Section 4.3." *Id.* 134a; 148a. Section 4.3, in turn, specifies that the annuity benefit attributable to a retirement account balance must be calculated "using annuity rates established by the PBGC." *Id.* 141a; 150a.

Based upon these provisions, the Plan Administrator interpreted the Plan to require an offset in an amount equal to the annuity that could have been purchased with the participant's prior lump sum distribution using interest rates specified by the PBGC. *Id.* 148a-50a. This interpretation is amply supported by the terms of the pre-1998 Plan, especially when *Firestone* deference is accorded to the Plan Administrator.

3. Even were the Government correct that the Plan was "silent" regarding the offset calculation, this would not justify withholding deference from the Plan Administrator. As the Seventh Circuit has recognized, it "is implicit in the idea of deferential review" that where "the plan document does not furnish the answer to [a] question, the answer given by the plan administrator ... will ordinarily bind the court." *Gallo* v. *Amoco Corp.*, 102 F.3d 918, 922 (7th Cir. 1996). Thus, as *Gallo* recognizes, silence is not a reason to deny deference but a circumstance requiring it.

II. REVIEW SHOULD BE GRANTED ON THE SECOND QUESTION.

The Second Circuit compounded its error of refusing to accord deference to the Plan Administrator by deferring to the District Court's so-called "allowable discretion" to interpret the Plan on remand. Pet. 29-33. This was a fundamental error: the District Court was obliged to interpret the Plan *correctly* – not just "reasonably" – on remand. The Government's only response is that "allowable discretion" was warranted because "the district court *was not interpreting plan terms* when it fashioned the remedy here, because the plan was *silent* about how to calculate the offset." Br. U.S. 13 (emphasis added). As discussed above (at 1-2, 9-12), that is not correct and is not what the Second Circuit held.

The novel standard of review that the Second Circuit applied to the District Court's interpretation of plan terms exposes employers to the troubling prospect that district courts may adopt any interpretation of a plan that is not "unreasonable" in the course of awarding a remedy in an ERISA case. If this were the law, different district courts could adopt conflicting interpretations of the very same plan, and ERISA's goal of promoting uniform and consistent administration of benefit plans would be thwarted. Pet. 33-34. The Petition should be granted to correct this important error. In the alternative, because the Second Circuit's failure to apply the proper standard of review clearly departed from settled law, summary reversal is warranted.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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June 2009

Nos. 08-803, 08-810 and 08-826

In the Supreme Court of the United States

MATTHEW D. ALFIERI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

SALLY L. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

KENNETH PIETROWSKI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals applied correct standards of review in this denial-of-benefits case under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, when it concluded that:

   (a) the administrator of an ERISA plan whose denial of benefits violated ERISA was not entitled to deference regarding its opinion on how to remedy the violation, and

   (b) the district court's choice of remedy should be reviewed for abuse of discretion.

2. Whether the court of appeals applied correct legal principles in holding that employees who signed general releases knowingly and voluntarily waived their claims under ERISA.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Discussion 8
A. The issues in No. 08-810 do not warrant this Court's review 9
B. The issues in Nos. 08-826 and 08-803 do not warrant this Court's review 18
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Administration Comm. of Wal-Mart Assoc. Health & Welfare Plan v. *Willard*, 393 F.3d 1119 (10th Cir. 2004) 15
Barrett v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976) 17
Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v. *E-Systems, Inc.*, 257 F.3d 461 (5th Cir. 2001) 13
Canseco v. *Construction Laborers Pension Trust*, 93 F.3d 600 (9th Cir 1996), cert. denied, 520 U.S. 1118 (1997) 12
Central States, Se. & Sw. Areas Pension Fund v. *Central Transp., Inc.*, 472 U.S. 559 (1985) 15
Chaplin v. *NationsCredit Corp.*, 307 F.3d 368 (5th Cir. 2002) 20
Colton v. *Colton*, 127 U.S. 300 (1888) 11
Cook v. *Liberty Life Assurance Co.*, 320 F.3d 11 (1st Cir. 2003) 12, 13

Cases—Continued: Page

Downie v. *Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991) 13
Eddy v. *Prudence Bonds Corp.*, 165 F.2d 157 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948) 17
Emor, Inc. v. *Cyprus Mines Corp.*, 467 F.2d 770 (3d Cir. 1972) 17
FDIC v. *Brants*, 2 F.3d 147 (5th Cir. 1993) 17
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 10
Gallo v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) 17
Grosz-Salomon v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154 (9th Cir. 2001) 12
Halpin v. *WW. Grainger, Inc.*, 962 F.2d 685 (7th Cir. 1992) 12
Harte v. *Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir.), cert. denied, 531 U.S. 1037 (2000) 15
Hunter v. *Caliber Sys., Inc.*, 220 F.3d 702 (6th Cir. 2000) 15
Kennedy v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009) 21
Layaou v. *Xerox Corp.*, 238 F.3d 205 (2d Cir. 2001) 4
Leavitt v. *Northwestern Bell Tel. Co.*, 921 F.2d 160 (8th Cir. 1990) 18
Madrid v. *Phelps Dodge Corp.*, 211 Fed. Appx. 676 (10th Cir. 2006) 20
Metropolitan Life Ins. Co. v. *Glenn*, 128 S. Ct. 2343 (2008) 10

Cases—Continued: Page

Miller v. *Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), cert. denied, 549 U.S. 1280 (2007) 13

Moench v. *Robertson*, 62 F.3d 553 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996) 15

NLRB v. *Hobart Bros. Co.*, 372 F.2d 203 (6th Cir. 1967) 17

Pakovich v. *Broadspire Servs., Inc.*, 535 F.3d 601 (7th Cir. 2008) 16

Oliver v. *Coca-Cola Co.*, 546 F.3d 1353 (2008) 15, 16

Oubre v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998) 20

Smart v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173 (1st Cir. 1995) 18, 20

United States v. *Andrews*, 530 F.3d 1232 (10th Cir. 2008) 13

Welsh v. *Burlington N., Inc., Employee Benefits Plan*, 54 F.3d 1331 (8th Cir. 1995) 17, 18

White v. *Coca-Cola Co.*, 542 F.3d 848 (11th Cir. 2008), cert. denied, No. 08-991 (Apr. 6, 2009) 16

Worthy v. *New Orleans S.S. Ass'n*, 342 F.3d 422 (5th Cir. 2003) 15

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 6

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 2

29 U.S.C. 1022(a) 2

29 U.S.C. 1022(b) 2

Statutes—Continued: Page

29 U.S.C. 1054(g) 2, 4
29 U.S.C. 1054(h) 2, 4
29 U.S.C. 1104(a)(1)(D) 21
29 U.S.C. 1132(a)(1)(B) (§ 502(a)(1)(B)) 3, 10
29 U.S.C. 1132(a)(3) (§ 502(a)(3)) 3
Older Workers Benefit Protection Act, 29 U.S.C. 626 (f)(1) 6, 20
Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 18

Miscellaneous:

George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* (rev. 2d ed. 1980) 11
Restatement (Second) of Trusts (1959) 11
2 Restatement (Third) of Trusts (2003) 11
3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* (4th ed. 1988) 11

In the Supreme Court of the United States

No. 08-803

MATTHEW D. ALFIERI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

No. 08-810

SALLY L. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

No. 08-826

KENNETH PIETROWSKI, ET AL., PETITIONERS

v.

SALLY L. CONKRIGHT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for a writ of certiorari should be denied.

STATEMENT

1. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, the administrator of an employee benefit plan must give plan participants a summary plan description (SPD) that "shall be sufficiently accurate and comprehensive to reasonably apprise [them] of their rights and obligations under the plan." 29 U.S.C. 1022(a). The SPD must provide notice of, among other things, "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. 1022(b). ERISA also generally requires the administrator of a pension plan to give participants prior written notice of any plan amendment that significantly reduces the rate of future benefit accrual. 29 U.S.C. 1054(h). And ERISA's anti-cutback provision prohibits amendments that decrease benefits that have already accrued. 29 U.S.C. 1054(g).

2. This case was brought by employees of Xerox Corporation who are participants in the Xerox Corporation Retirement Income Guarantee Plan (the Plan), an ERISA-covered pension plan that is a petitioner in No. 08-810. Pet. App. 24a-25a.[1] The employees were rehired by Xerox after previously leaving the company and receiving lump-sum distributions of pension benefits that they had accrued before their departures. *Id.* at 25a. The employees claim that the Plan and its administrators (the other petitioners in No. 08-810) violated ERISA by using a "phantom account" method to calculate the amount by which the employees' current pension benefits are offset to reflect their prior distributions. *Id.* at 75a. In essence, the phantom account

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 08-810.

method reduces an employee's current benefits to reflect not only the actual amount of the prior distribution, but also hypothetical investment gains that the distribution would have earned if it had remained in the employee's pension account and been invested. *Id.* at 5a.

The employees sued the Plan and its administrators under ERISA Section 502(a)(1)(B) and (3), 29 U.S.C. 1132(a)(1)(B) and (3). The employees argued that, until the Plan and the SPD were amended in 1998, the Plan did not provide for use of the phantom account method to calculate the offset for the distributions they previously received, and that the SPD did not disclose that the phantom account method would be used. Pet. App. 75a, 81a-82a. The employees contended that the Plan and its administrators had therefore violated ERISA's SPD, notice, and anti-cutback provisions. *Id.* at 75a-76a.

The district court granted summary judgment in favor of the Plan and its administrators. Pet. App. 61a-98a. As relevant here, the court accepted their argument that "the Plan has always provided for the challenged offset" and that the 1998 amendments only made express what the pre-1998 plan terms implicitly provided. *Id.* at 75a; see *id.* at 79a-93a.

3. The court of appeals vacated the district court's decision in relevant part. Pet. App. 22a-60a. The court of appeals found that, although the Plan has always contained a non-duplication provision stating that benefits will be offset by prior distributions, *id.* at 26a-28a, until 1998, the Plan did not address how to calculate the offset for the distributions received by the plaintiff employees. See *id.* at 28a-29a ("[T]he 1989 Restatement" of the Plan "did not specify how the Plan would account for the prior distributions."); *id.* at 37a ("Not until 1998, when the phantom account was fully explained in an SPD, was

the text of the Plan amended and adequate information provided to former Xerox employees concerning the treatment of their previous distributions."). The court observed that it had already held, in *Layaou* v. *Xerox Corp.*, 238 F.3d 205, 209-212 (2d Cir. 2001), that earlier versions of the Plan violated ERISA's SPD requirement by failing to "provide notice" that participants' "future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." Pet. App. 43a-44a (quoting *Layaou*, 238 F.3d at 210). Accordingly, the court held "that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable," even under "an arbitrary and capricious standard" of review. *Id.* at 44a. The court further held that the Plan's efforts to apply the phantom account method before issuance of the 1998 SPD violated the requirement in Section 1054(h) that plans provide advance notice of amendments that significantly reduce the rate of future benefit accrual, *id.* at 49a, and that application of the phantom account method to employees rehired before 1998 impermissibly reduced accrued benefits in violation of Section 1054(g), *id.* at 50a.

The court of appeals remanded the case for the district court to craft a remedy for those ERISA violations, "utiliz[ing] an appropriate pre-amendment calculation to determine [employees'] benefits." Pet. App. 51a. Noting "the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated," the court of appeals suggested that the district court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Ibid.*

4. On remand, the district court determined that the plaintiff employees' benefits should be calculated by

subtracting the actual amount of prior distributions without adjustment for hypothetical investment gains or losses. Pet. App. 102a-108a. Noting that the pre-1998 plan terms said "virtually nothing" about how to account for prior distributions, *id.* at 104a, the court reasoned that deducting the actual amount of the distributions is straightforward, adequately prevents employees from receiving a windfall, and "most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD." *Id.* at 107a. The court rejected testimony that "focused on the appropriate economic, financial and actuarial methods for treating prior distributions," stating that "[i]f the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing." *Id.* at 104a.

The district court also concluded that 22 of the plaintiff employees, 18 of whom are petitioners in Nos. 08-803 and 08-826, were entitled to relief even though they had signed general releases when their employment was terminated through reductions in force that occurred during the litigation. Pet. App. 109a-121a.[2] The court reasoned that plan participants may waive ERISA claims, but a waiver must be knowing and voluntary and is subject to closer scrutiny than a waiver of general contract claims. *Id.* at 112a-113a. Applying a "totality of the circumstances" test previously adopted by the court of appeals, the district court concluded that although some considerations weighed in favor of uphold-

[2] The four release signers who are not petitioners in Nos. 08-803 or 08-826 altered their releases to exclude their claims in this litigation, and the Plan and its administrators conceded that their claims are not barred. Pet. App. 14a n.4, 111a.

ing the releases, they should not be given effect because of deficiencies in the "clarity of the release[s] and the consideration given by Xerox in exchange for the releases." *Id.* at 113a-114a (citation omitted).

In particular, the district court found that the releases were ambiguous because although they stated that they covered "any and all claims," including ERISA claims, they also stated that the consideration for the releases was "in addition to anything of value to which [the employee] is entitled by law and/or Xerox policy." Pet. App. 114a (citation omitted). The court concluded that the latter language could be read to preserve the employees' rights to pension benefits calculated without a "phantom account" reduction because the court of appeals had held that the employees were "entitled by law" to those unreduced benefits. *Id.* at 115a-116a. The district court also stated that the failure of the releases to comply with requirements in the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f)(1), which governs waivers of claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, was "some evidence" that the waivers were not knowing and voluntary. Pet. App. 116a n.5.

5. The court of appeals upheld the district court's choice of a remedy for the ERISA violations, but vacated the district court's holding that the releases were unenforceable. Pet. App. 1a-21a.

The court of appeals reviewed the district court's choice of remedy for abuse of discretion. Pet. App. 8a. The court of appeals concluded that the Plan and its administrators had failed to establish that the district court's approach "violated either the Plan terms or any law." *Id.* at 9a. The court also rejected their arguments that the district court erred by not adopting an approach

that would have treated the plaintiffs as newly hired employees, by not remanding the remedy issue to the plan administrator, and by failing to defer to the administrator's approach. *Id.* at 9a-14a.

In addressing the deference due the administrator's approach, the court of appeals recognized that where an ERISA plan gives the administrator discretionary authority to construe plan terms, a district court should review the administrator's decision "under an excess of allowable discretion standard." Pet. App. 12a. The court of appeals concluded, however, that the deference principle did not apply to the remedial determination in this case because the district court had no "decision" to review. *Id.* at 13a. The court of appeals explained that the Plan and its administrators had identified "no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." *Ibid.* Because the Plan "addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence," the court saw "no problem with the District Court's selection of one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a.

Turning to the releases signed by the petitioners in Nos. 08-803 and 08-826, the court of appeals held that the releases were enforceable. Pet. App. 14a-21a. It rejected the district court's view that the releases were ambiguous, explaining that the district court had "conflated the existence of consideration adequate to render a release enforceable with the scope of claims thereby released." *Id.* at 18a. The court of appeals concluded

that the language in which the district court had found ambiguity (see p. 6, *supra*) "provided only that the consideration for the release[s], *i.e.*, the salary continuance[s], did not replace any benefits, including pension benefits, to which the employee[s] w[ere] already entitled." Pet. App. 19a. Noting that the employees had not alleged that Xerox had violated that provision by denying them pension benefits based on the salary continuances, the court concluded that uncertainty over the amount of benefits when the releases were signed did not render them unenforceable. *Id.* at 19a-20a.

The court of appeals then applied the "totality of the circumstances" test articulated in circuit precedent and, based on "the undisputed facts," determined that the releases were knowing and voluntary. Pet. App. 20a-21a. The court stated that it need not decide whether the releases complied with the OWBPA because that statute is irrelevant to ERISA claims. *Id.* at 18a n.5.

DISCUSSION

The court of appeals correctly upheld the district court's choice of remedy for the ERISA violations committed by the petitioners in No. 08-810 (the Xerox petitioners), and the court of appeals' rulings on the remedy issue do not conflict with any decision of this Court or another court of appeals. This Court's review of the uestions presented in No. 08-810 is therefore not warranted. Nor is review warranted of the court of appeals' holding that the petitioners in Nos. 08-803 and 08-826 (the release petitioners) validly released their ERISA claims. Contrary to the release petitioners' contentions, the court of appeals did not adopt a new standard for assessing the enforceability of releases of ERISA claims, reject the applicability of common law principles

in ERISA cases, or erroneously fail to apply OWBPA standards. And the court's decision on the release issue is consistent with decisions of this Court and other courts of appeals. Accordingly, this Court should deny all three petitions for a writ of certiorari.

A. The Issues In No. 08-810 Do Not Warrant This Court's Review

1. a. Contrary to the contentions of the Xerox petitioners (Pet. 11-12, 17-22), the court of appeals correctly held that the district court was not required to defer to the plan administrator's views on the appropriate remedy for the ERISA violations committed by the administrator and the Plan. When the district court crafted that remedy, the court of appeals had already concluded that the pre-1998 Plan (including its non-duplication-of-benefits provision) did not address how to calculate the amount by which the plaintiff employees' benefits should be offset to account for their prior distributions. Pet. App. 28a-29a, 37a. The court of appeals had also already held that the Plan's failure to specify an offset method and the administrator's efforts to impose the phantom account method violated ERISA's SPD and notice requirements, *id.* at 43a-51a, and that the administrator had arbitrarily and capriciously interpreted the pre-1998 plan terms to incorporate the phantom account method, *id.* at 44a. See pp. 3-4, *supra*. In those circumstances, the district court had no obligation to defer to the administrator's newly-minted assertion that the same pre-1998 plan terms provided for a different offset method. On the contrary, because the court of appeals had determined that the plan terms were silent on the appropriate offset method, the district court had discretion to select a reasonable method in the exercise of

its discretion to craft an appropriate remedy for the ERISA violations. See Pet. App. 12a-14a.[3]

In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989) (*Firestone*), this Court held that courts should be "guided by principles of trust law" when they "determin[e] the appropriate standard of review" for decisions in actions, like this one, challenging benefits determinations under 29 U.S.C. 1132(a)(1)(B). Based on trust principles, the Court further held that a benefits decision by a plan administrator is reviewed de novo, unless the administrator is exercising discretion conferred by the plan to determine eligibility for benefits or to construe the plan terms, in which case abuse-of-discretion review applies. *Firestone*, 489 U.S. at 111-115. In *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008), this Court reaffirmed *Firestone*'s approach, relying on trust law in concluding that a reviewing court should consider an administrator's conflict of interest as one "of several different, often case-specific, factors" that are "weigh[ed] all together" to determine the lawfulness of the administrator's action. *Id.* at 2351 (citing,

[3] The district court's decision not to defer to the administrator's proposed offset method was particularly reasonable given that this method was only one of two alternative approaches that the Xerox petitioners advanced on remand. See 08-810 Pet. C.A. Br. 6, 16, 33-36 (discussing alternative "new hire" approach); C.A. App. A113 (same). The Xerox petitioners' contention that the court erred in declining to defer to the plan administrator's method thus cannot be reconciled with their own advocacy of a different method. Moreover, the Xerox petitioners did not clearly and timely ask the district court to defer. Compare 08-810 Pet. Pre-Hearing Br. Addressed to Remedies (failing to ask for deference) and C.A. App. A389, A395 (appearing to agree with district court that deference not warranted) with 08-810 Pet. Pre-Hearing Reply Br. Addressing Remedies 2 (asking for deference).

inter alia, Restatement (Second) of Trusts § 187 cmt. d at 403 (1959) (Second Restatement)).

The court below acted consistently with trust law in holding that the district court was not required to defer to the plan administrator's preferred approach to the offset issue when crafting a remedy for the administrator's ERISA violations. Even where a trustee has discretion to determine the benefits of a trust beneficiary, a "court will control the trustee in the exercise of [that] power" if the trustee makes an "arbitrary decision" or acts "beyond the bounds of a reasonable judgment." Second Restatement § 187 cmts. h and i; see 2 Restatement (Third) of Trusts § 50 & cmt. b (2003) (Third Restatement); 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 187, 187.2, 187.3 (4th ed. 1988) (Scott). "Where the court finds that there has been [such] an abuse of a discretionary power, the decree to be rendered is in its discretion." George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 560, at 222 (rev. 2d ed. 1980) (Bogert). In exercising that discretion, the court may, if the circumstances warrant, make its own judgment about the benefits due and order payment by the trustee. See *id.* at 223. Thus, the court may, in appropriate circumstances, "itself fix the amount" that the trustee shall pay rather than defer to the trustee to determine a reasonable amount. Scott § 187.1, at 28; see Third Restatement § 50 cmt. b at 261; Bogert § 560, at 223 n.19 (giving examples); see, *e.g.*, *Colton* v. *Colton*, 127 U.S. 300, 322 (1888).

In accord with these principles and the decision below, other courts of appeals have held that "[o]nce a court finds that an administrator has acted arbitrarily and capriciously in denying a claim for benefits, the court can either remand the case to the administrator

for a renewed evaluation of the claimant's case, or it can award a retroactive reinstatement of benefits." *Cook* v. *Liberty Life Assurance Co.*, 320 F.3d 11, 24 (1st Cir. 2003). See, *e.g.*, *Halpin* v. *WW. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992). "[T]he principle of ERISA deference does not deprive a court of its discretion to formulate a necessary remedy when it determines that the plan has acted inappropriately." *Cook*, 320 F.3d at 24. Thus, a court is not required in all cases to allow the administrator a second opportunity to determine the appropriate level of benefits when the court has determined that the administrator acted arbitrarily in construing plan language. See, *e.g.*, *Canseco* v. *Construction Laborers Pension Trust*, 93 F.3d 600, 609 (9th Cir. 1996), cert. denied, 520 U.S. 1118 (1997). Reconsideration by the administrator may be appropriate in some cases where the administrator simply failed adequately to explain its reasoning or where the correct determination of benefits will depend on the construction of plan language that actually addresses the issue but is ambiguous. See *Grosz-Salomon* v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001). Here, however, the administrator's initial interpretation had already been found unreasonable and in violation of ERISA, and a correct determination did not depend on construing ambiguous plan terms because the plan said "virtually nothing" about how to calculate an offset. Pet. App. 104a.

b. For similar reasons, the Xerox petitioners are also incorrect in asserting (Pet. 28-33) that the court of appeals applied the wrong standard in reviewing the district court's choice of remedy. Because a district court has discretion to fashion the appropriate remedy when a trustee has abused his authority, a court of appeals should review the district court's choice of remedy in

such circumstances for abuse of discretion. That approach accords with principles of trust law, under which courts of appeals review a district court's choice of equitable remedies for abuse of discretion. See *United States* v. *Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008); *Burkhart Grob Luft und Raumfahrt GmbH & Co. KG* v. *E-Systems, Inc.*, 257 F.3d 461, 469 (5th Cir. 2001). And it is consistent with the case law under ERISA. See, *e.g.*, *Cook*, 320 F.3d at 24 ("An appellate court reviews a district court's choice of remedy for an ERISA violation for abuse of discretion."); *Downie* v. *Independent Drivers Ass'n Pension Plan*, 934 F.2d 1168, 1170 (10th Cir. 1991) (same).

Contrary to the Xerox petitioners' contention (Pet. 28), application of abuse-of-discretion review in this case does not conflict with the rule that judicial review of interpretations of written instruments is generally de novo. Nor does applying abuse-of-discretion review here authorize district courts to adopt conflicting interpretations of the same plan language. Pet. 33. As discussed above, the district court was not interpreting plan terms when it fashioned the remedy here, because the Plan was silent about how to calculate the offset for the prior distributions. See pp. 3-4, 9, 12, *supra*; Pet. App. 13a, 28a-29a, 37a, 104a.[4]

[4] The Xerox petitioners are mistaken in asserting (Pet. 26-27) that *Miller* v. *Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), cert. denied, 549 U.S. 1280 (2007), required the plan administrator to use the offset method that the administrator advocated on remand in this case. The Ninth Circuit in *Miller* held that using the phantom account method to offset benefits violated ERISA because it reduced pension benefits by more than the accrued benefit attributable to earlier distributions. *Id.* at 872, 874. Although the court stated that "the offset *permitted*" was "one based on the actual actuarial equivalent" of the prior distribution, *id.* at 876 (emphasis added), the court did

2. a. The Xerox petitioners err in contending (Pet. 12, 17-22) that the decision below conflicts with this Court's decisions in *Firestone* and *Glenn*. That contention is based on the incorrect premise that the court of appeals held "that no deference is due to a plan administrator's interpretation of plan language when the administrator interprets the plan outside of the plan's administrative claims process." *Id.* at 12. The court made no such holding. Instead, the court held that deference to the administrator's opinion on the appropriate offset method was not required because "the administrator had previously construed the same terms" and the court had "found such a construction to have violated ERISA." Pet. App. 13a. Moreover, the court of appeals had already determined that those terms did not address the offset method. *Id.* at 13a, 28a-29a, 37a. Neither *Firestone* nor *Glenn* addresses whether a plan administrator is due deference when the administrator proposes a new interpretation of plan terms that the administrator previously construed arbitrarily and capriciously and in violation of ERISA. Nor do they address whether deference is due when a court has already determined that the plan terms do not speak to the relevant issue.

b. For similar reasons, the Xerox petitioners are incorrect in contending (Pet. 12-17) that the court of ap-

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not *require* the plan to offset benefits by an actuarial equivalent rather than only the actual amount of the prior distributions, much less require use of the particular actuarial equivalent proposed by the administrator on remand in this case. Nor did the court in *Miller* consider whether the ERISA violations found in this case, including the SPD and notice violations, might weigh against adoption of an offset based on any amount greater than the actual amount of prior distributions. See Pet. App. 104a (district court's conclusion that "[i]f the employee had no notice of the 'phantom account,' he also had no notice of some of the other mechanisms suggested by witnesses at the remand hearing").

peals' deference ruling conflicts with decisions of other courts of appeals. Most of the cases cited by the Xerox petitioners involve the application by courts of appeals of deferential review to a plan administrator's interpretation of plan provisions even though that interpretation was not expressed through a decision on a benefits claim. See *Administrative Comm. of Wal-Mart Assoc. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004); *Worthy* v. *New Orleans S.S. Ass'n*, 342 F.3d 422, 427-428 (5th Cir. 2003); *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000); *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446, 448 (3d Cir.), cert. denied, 531 U.S. 1037 (2000); *Moench* v. *Robertson*, 62 F.3d 553, 566-567 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996); see also *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 568 (1985). Because the decision below does not hold that a plan administrator receives deference only for an interpretation expressed through a decision on a benefits claim, it does not conflict with those decisions. In addition, unlike the decision below, the decisions from the other circuits do not involve an administrator's second attempt to apply plan provisions after a court has rejected its previous interpretation as arbitrary and capricious and in violation of ERISA and has determined that the plan terms are silent on the relevant issue.

The other cases on which the Xerox petitioners base their claim of a conflict likewise do not involve these circumstances. In *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1353-1354 (2008), the Eleventh Circuit held that a plan administrator had erroneously determined that a participant was not entitled to disability benefits. The court remanded the case to the district court for calcula-

tion of the benefits due, with instructions to allow the plan administrator to offer an interpretation of a plan term providing for plan benefits to be offset by Social Security benefits and to review the administrator's interpretation under the deferential standard articulated in *Glenn*. *Oliver* is consistent with the decision below because, when the Eleventh Circuit remanded *Oliver*, it had neither rejected the administrator's interpretation of the relevant plan provision nor determined that the provision was silent on the relevant issue. On the contrary, the Eleventh Circuit had held in a related case that the administrator's construction of the provision was reasonable. See *ibid.* (citing *White* v. *Coca-Cola Co.*, 542 F.3d 848, 853-857 (11th Cir. 2008), cert. denied, No. 08-991 (Apr. 6, 2009)).

The decision below is likewise consistent with *Pakovich* v. *Broadspire Services, Inc.*, 535 F.3d 601 (7th Cir. 2008). In *Pakovich*, a plan administrator denied a claim for disability benefits on the ground that a claimant was not totally disabled from her own occupation, as required to obtain benefits for 24 months, without deciding whether she was unable to work at any occupation, as required to obtain benefits beyond 24 months. *Id.* at 602. The district court reversed the "own occupation" determination but went on to find that the claimant was not disabled from all occupations and therefore was not entitled to benefits beyond 24 months. *Ibid.* The court of appeals held that because the plan administrator had not addressed the "all occupations" issue, the matter should have been remanded to the administrator to address that issue in the first instance. *Id.* at 602, 607. That holding is consistent with the decision below because, in *Pakovich*, the administrator had not previously interpreted the relevant plan provisions and the court

had neither already rejected the administrator's interpretation nor determined that the provisions did not address the relevant issue.[5]

3. The Xerox petitioners are also mistaken in contending (Pet. 29-32) that the court of appeals created a circuit conflict by reviewing the district court's choice of remedy for abuse of discretion. All but one of the cases on which the Xerox petitioners rely are non-ERISA decisions applying de novo review to interpretations of written documents. *FDIC* v. *Brants*, 2 F.3d 147, 150 (5th Cir. 1993); *Barrett* v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976); *Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F.2d 770, 773 (3d Cir. 1972); *NLRB* v. *Hobart Bros. Co.*, 372 F.2d 203, 206 (6th Cir. 1967); *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948). None addressed the appropriate standard for reviewing a district court's choice of remedy for an ERISA violation. The only ERISA case cited by the Xerox petitioners, *Welsh* v. *Burlington Northern, Inc., Employee Benefits Plan*, 54 F.3d 1331 (8th Cir. 1995), also did not discuss what standard applies to review of a district court's choice of

[5] The decision below is also consistent with *Gallo* v. *Amoco Corp.*, 102 F.3d 918 (7th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) (see Pet. 23-24 n.8). In *Gallo*, the Seventh Circuit held that an administrator could defend its interpretation of a plan with arguments that the administrator had not presented when denying the claim for benefits. *Id.* at 922-923. In dicta, the court stated that even if an administrator failed fully to explain the basis for its interpretation in judicial proceedings, the court would have to remand the case to the administrator unless a denial of benefits would clearly be unreasonable. *Id.* at 923. The dicta in *Gallo* is inapposite here because the Xerox administrator had already offered a full interpretation of the plan provisions, and the court of appeals had rejected that interpretation and determined that the provisions were silent on the relevant issue.

ERISA remedy. The court in *Welsh* appears to have applied de novo review in upholding a district court's computation of benefits under a plan that allowed an offset for benefits received under the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 54 F.3d at 1340-1342. But the benefits decision turned on interpretation of a plan phrase, "primary amount of payment," and there is no indication that the administrator had previously interpreted that phrase or that the Eighth Circuit had rejected its interpretation. See *id.* at 1341. The court in *Welsh* therefore had no occasion to address the standard for reviewing a district court's calculation of benefits where, as here, the plan is silent on the relevant issue, the plan administrator had previously expressed a view on the issue, and the court of appeals had rejected that position as arbitrary and capricious and in violation of ERISA.

Accordingly, the issues presented in No. 08-810 do not warrant this Court's review.

B. The Issues In Nos. 08-826 And 08-803 Do Not Warrant This Court's Review

The issues presented in Nos. 08-826 and 08-803, which challenge the court of appeals' decision that the release petitioners knowingly and voluntarily waived their ERISA claims, also do not warrant this Court's review.

1. The courts of appeals generally require that releases of rights under ERISA be knowing and voluntary and assess the validity of releases according to the totality of the circumstances. See, *e.g.*, *Smart* v. *Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181-182 (1st Cir. 1995); *Leavitt* v. *Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990). The court below similarly

required the releases here to be knowing and voluntary and applied a "totality of the circumstances" test to make that determination. Pet. App. 16a-17a, 20a-21a. There is no reason for this Court to revisit that fact-bound application of settled law to the circumstances of this case.

2. The release petitioners in No. 08-826 argue (Pet. 9-20) that the court of appeals effectively created a new "group" standard by failing to apply the "totality of the circumstances" test separately to each individual who signed a release. The 08-826 petitioners do not, however, dispute the Xerox petitioners' assertion that they failed to submit any individualized facts in the district court or to argue in the court of appeals that additional factual development was required. See 08-803 & 08-826 Br. in Opp. 12, 14-15. In light of that failure, the court below cannot be faulted for not considering the individual circumstances of each person who signed a release.

3. The release petitioners in No. 08-803 argue (Pet. 9, 11-14) that the court of appeals erroneously failed to apply federal common law principles in considering the validity of the releases. They contend that the court should have invalidated the releases based on principles requiring employer-drafted documents to be strictly construed against the drafter, subjecting waivers of pension claims to closer scrutiny than waivers of general contract claims, precluding enforcement of releases that were the product of extreme economic pressure, and directing that the SPD controls if it conflicts with a plan document. *Id.* at 11-14.

At bottom, that argument is merely a case-specific disagreement with the court of appeals' conclusion that the releases clearly waived the release petitioners' ERISA claims. See 08-803 Pet. 14. That court's deci-

sion is not reasonably read as a holding that federal common law principles do not apply in ERISA cases. As petitioners acknowledge, the court of appeals has applied the strict construction, close scrutiny, and SPD principles in prior cases. See 08-803 Pet. 12-13 (citing Second Circuit cases). The court did not reject those principles here, but rather simply concluded that the releases were knowing and voluntary. Pet. App. 16a-20a. The court's holding that the waivers were knowing and voluntary appears to have been based on a conclusion that the language of the releases was sufficiently clear to preclude reliance on the common law principles cited by the 08-803 petitioners. See *id.* at 20a; accord *Smart*, 70 F.3d at 178-181 (recognizing federal common law principles but upholding severance agreement that the court found clearly included release of ERISA benefits). Whether the release language was, in fact, sufficiently clear to support the decision below is a fact-bound question that does not warrant this Court's attention.

The 08-803 petitioners also contend (Pet. 15-18) that the court of appeals erred by failing to apply to the ERISA claims here OWBPA standards for determining when a release is knowing and voluntary under the ADEA. As the 08-803 petitioners acknowledge (Pet. 15), however, the OWBPA "imposes specific requirements for releases covering ADEA claims," *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 424 (1998)—not ERISA claims. See 29 U.S.C. 626(f)(1). The courts of appeals that have addressed the question agree that the OWBPA's requirements do not apply to releases of ERISA claims. *Chaplin* v. *NationsCredit Corp.*, 307 F.3d 368, 375-376 (5th Cir. 2002); *Madrid* v. *Phelps Dodge Corp.*, 211 Fed. Appx. 676, 680 (10th Cir. 2006).

The conclusion of the court below that the OWBPA is irrelevant to this case, Pet. App. 18a n.5, is consistent with those decisions. Review of the OWBPA issue is therefore not warranted.

4. Finally, contrary to the release petitioners' contention in their supplemental brief (08-803 & 08-826 Pet. Supp. Br. 3-10), *Kennedy* v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009), provides no basis for either plenary review or vacating the decision below and remanding for further proceedings. In *Kennedy*, the Court held that a plan administrator was not required to give effect to a beneficiary's waiver of benefits due to her under the plan, because to do so would be contrary to ERISA's statutory requirement, in 29 U.S.C. 1104(a)(1)(D), that a plan shall be administered in accordance with the terms of plan documents. See 129 S. Ct. at 875. *Kennedy* may not govern the validity of the releases in this case. Unlike the waiver of benefits in *Kennedy*, the releases here purport to cover claims against the plan and its administrator, and the release petitioners' entitlement to benefits was in dispute when they signed the releases. In any event, the release petitioners did not raise a *Kennedy*-type claim in the courts below, and those courts did not address any such claim. Indeed, contrary to their new argument based on *Kennedy* that the releases are barred by statute, the release petitioners repeatedly argued below that federal common law governs the validity of releases of ERISA claims, and they sought this Court's review of whether the decision below "contravenes principles of contract interpretation under federal common law." 08-803 Pet. i. Accordingly, the release petitioners' *Kennedy* claim is not properly before this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009